

APPENDIX I

APPLICATION OF *REPORT AND ORDER*, NEXTEL'S REQUESTS FOR CLARIFICATIONS AND PREFERRED'S IMPROVEMENTS TO SPECIFIC EA MARKETS

I. Introduction

In seeking to resolve the apparent conflict in the paragraphs 159, 162-163 and 168 of the Report and Order with respect to the movement of EA- and Site-Licensed Spectrum held by Non-Nextel EA and Cellular-Architecture System Site Licensees, Preferred has examined the 800 MHz spectrum holdings in five (5) EA markets: (1) Sacramento, California; (2) Washington-Baltimore, D.C.-Maryland-Virginia-West Virginia-Pennsylvania; (3) Atlanta, Georgia-Alabama-North Carolina; (4) Puerto Rico; and (5) Staunton, Virginia-West Virginia.

With respect to the movement of the EA- and Site-Licensed Spectrum of the NCG, the Commission largely adopted the Enhanced Consensus Parties' Proposal. As a result, both the EA- and Site-Licensed Spectrum of these licensees moves into the ESMR portion of the band on an EA market wide Clean 1:1 basis (General Category Channels)¹ or is vacated and credited toward the purchase price of the nationwide 10 MHz license in the 1.9 GHz band (Interleave and Lower 80 Channels).² This result apparently also applies regardless of whether the Site-Licensed Spectrum held by the Nextel Control Group is constructed and incorporated into a Cellular-Architecture System as of the *Report and Order's* publication in the Federal Register.³

With respect to the movement of Non-Nextel EA licensees' EA-Licensed Spectrum, the Report and Order purportedly offers such licensees an "incentive" to relocate their respective Spectrum holdings by affording them the flexibility of three (3) options:

- (1) Relocate all of their systems in an EA market into the ESMR portion (817-824 MHz/862-869 MHz) portion of the band where they will share spectrum with Nextel, Nextel Partners and licensees which have executed a management or purchase option agreement with Nextel ("Nextel Control Group" or "NCG");
- (2) Relocate their systems as close as possible to the ESMR portion of the band but remain in the non-cellular portion of the band, i.e., in order of preference:

¹ See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 ("Report and Order") at ¶ 23. The treatment of Site-Licensed Spectrum held by the Nextel Control Group and by Non-Nextel EA and Cellular-architecture Site Licensees conflicts with the Commission's previous decisions concerning whether such expansion of spectrum rights (frequency reuse throughout the geographical market area) involved the issuance of an initial license triggering the competitive bidding provisions of Section 309(j) of the Communications Act of 1934. See Verizon Wireless, LLC, Ex Parte Presentation, April 6, 2004, pp. 11-12 & n. 49 ("Verizon Wireless White Paper").

² See *Report and Order*, at ¶ 35.

³ See *id.*, at ¶¶ 23, 161; Nextel Partners, Inc. Form 10-K filed with the Securities and Exchange Commission for the period ended December 31, 2003, pp. 20-21.

- (a) the 816-817 MHz/861-862 MHz Guard Band;
- (b) the 815-816 MHz/860-861 MHz Expansion Band; and
- (c) channels below 815 MHz/860 MHz if necessary.

According to the FCC, these licensees will operate on a strict non-interference basis, subject to pre-coordination of any new or modified operations; or

- (3) Remain on their current channels in the non-cellular portion of the band on a strict non-interference basis, subject to pre-coordination of any new or modified operations.

If a Non-Nextel EA or Cellular-Architecture System Site Licensees elect to relocate to the ESMR portion of the band, their EA licenses will move upon an EA market wide, Clean 1:1 basis. The FCC also recognized that these Licensees also hold Site-Licensed Spectrum. The FCC therefore also determined to provide these Licensees the option of relocating their Site-Licensed Spectrum along with their EA-Licensed Spectrum to the ESMR portion of the band. However, to transfer Site-Licensed Spectrum, a Non-Nextel EA or Cellular- Architecture System Site Licensee must:

- (a) currently hold an EA license in the relevant EA market; and
- (b) be using the Site-Licensed Spectrum as part of a cellular-architecture system in that EA market as of the date of the publication of the *Report and Order* in the Federal Register.

Moreover, to create a more uniform licensing scheme, the transferred Site-Licensed Spectrum would be converted to EA-Licensed Spectrum on a Clean 1:1 basis. If Non-Nextel EA or Cellular-Architecture System licensees elect to move to Guard Band or must be relocated to the Expansion Band, or to the spectrum immediately below, when necessary, subject to the conditions set forth immediately above, their Site-Licensed Spectrum also would be converted to EA-Licensed Spectrum on a Clean 1:1 basis.

In footnote 444 to paragraph 168 of the *Report and Order*, the FCC seemingly contradicts the three (3) preceding paragraphs by placing an additional limitation upon the movement of EA- and Site-Licensed Spectrum held by Non-Nextel EA and Cellular-Architecture System Site Licensees into the ESMR portion of the band. In paragraph 164 the Commission had noted that in some EA markets insufficient spectrum in the ESMR portion of the band may be available due to multiple incumbent ESMR licensees already operating in the band. The FCC cited, but did not limit this possible problem of insufficient spectrum to, those markets in which Nextel or Nextel Partners and Southern Communications Services (“Southern”) are offering service. In paragraph 164 the Commission had noted that in some EA markets insufficient spectrum in the ESMR portion of the band may be available due to multiple incumbent ESMR licensees already operating in the band. The FCC cited, but did not limit this possible problem of insufficient spectrum to, those markets in which Nextel or Nextel Partners and Southern Communications Services (“Southern”) are offering service.

The FCC then continues by stating that “[p]arties are hereby put on notice that disputed matters concerning the ESMR channels in any area of the country, including the area shown in Appendix G may be resolved by the Commission making a *pro rata* distribution of ESMR channels.” Citing footnote 444, the FCC then states in that footnote: “When the ESMR spectrum is not adequate to accommodate all eligible licensees that wish to relocate in the ESMR block, and parties are unable to agree, we may apportion the ESMR block as a function of the relative spectrum rights each licensee holds in a given EA. For example, in a hypothetical market, outside the area shown in Appendix G, in which licensee “A” currently has rights to 150 channels and licensee “B” has rights to 250 channels, the 320 channels in the ESMR block would be apportioned by giving licensee “A” access to 128 channels (40%) and licensee “B” access to 192 channels (60%).”

A. Spectrum Holdings in the Sacramento, California EA Market.

As set forth in the Chart immediately below, Nextel holds seventy-five (75) General Category EA-Licensed frequencies covering an average of 99.00% of the Sacramento, California EA market’s total population, or the equivalent of seventy-four (74) Channels of Clean Spectrum. Likewise, due to its sixty-five (65) Lower 80 EA frequencies covering an average of 98.93% of the EA market’s total population, Nextel would hold the equivalent of sixty-four (64) Channels of Clean Spectrum. Nextel holds forty-six (46) Business Category Channels in this EA market. Pursuant to the Commission’s decision allowing SMR licensees to purchase such Channels and convert them to CMRS, these Channels would be included. Due to these frequencies’ covering an average of 51.80% of the total population, Nextel would hold the equivalent of twenty-four (24) Channels of Clean Spectrum.

MARKET BEA164 SACRAMENTO, CA EA MARKET

NEXTEL CHANNELS SUMMARY

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA -WIDE CHANNELS
SMR GC EA	75	99.00%	74	75
SMR GC SITE	45	13.00%	6	
SMR L80 EA	65	92.53%	64	65
SMR L80 SITE	0	0.00%	0	
B/ILT	46	51.80%	24	
PS	0	0.00%	0	
SUBTOTALS (Freq's)	231		168	130
SUBTOTALS (MHz)	11.55		8.40	6.50

AIRPEAK/PCSI

CELLULAR ELIGIBLE FREQ'S
75
15
50
140
7.0

SMR U200 EA	200	100.00%	200	200
SMR U200 SITE	0		0	
SUBTOTALS (Freq's)	200		200	200
SUBTOTALS (MHz)	10.00		10.00	10.00

0.0
0
0.00

TOTALS (Freq's)	431		368	330	0
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TOTALS (MHz)	21.55		18.40	16.50	7.0
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	CHANNELS	MHz
NEXTEL Published	371	18.55

1. *Report and Order's Movement Methodology: (a) move the Nextel Control Group's General Category EA- and Site-Licensed Spectrum to the new Cellular Block on an EA market wide Clean 1:1 basis; (b) credit Nextel with a nationwide "running average" of the General Category, Interleave and Lower 80 Channels vacated by it, Nextel Partners and licensees which have executed a management or purchase option agreement with it and modify such spectrum by reassigning to Nextel 4.5 MHz of 1.9 GHz band spectrum; (c) move the Non-NCG's EA and Cellular-architecture Systems Site Licensees' EA-Licensed Spectrum to the new Cellular Block on an EA market wide, Clean 1:1 basis; however such Licensees' Site-Licensed Spectrum would move to the new Cellular Block on such basis only if (1) it is located in an EA market in which such Licensee holds an EA Authorization and (2) the Non-Nextel Control Group EA or Cellular-architecture System Site Licensee is using such Site-Licensed Spectrum as part of a Cellular-architecture System as of the date of the publication of the Report and Order in the Federal Register.*

Due to the presence of site-specific incumbents, Nextel, Nextel Partners and licensees who have executed a management or purchase option agreement with Nextel ("Nextel Control Group" or "NCG") hold one hundred sixty-eight (168) MHz/Pops Equivalent Lower 230 Channels. Upon their movement under the *Report and Order*, the Nextel Control Group would be allocated two hundred thirty-one (231) Channels on a Clean basis, a net gain of sixty-three (63) MHz/Pops Equivalent Channels. As noted in Preferred's Ex Parte Presentation filed on March 2, 2004, this result appears to belie the oft-repeated argument by the Consensus Parties that their Proposal involves only a "kHz-for-kHz exchange" or "replacement spectrum."⁴ Under the *Report and Order*, this result will hold true in all of the 175 EA markets.

⁴ See Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at pp. 27-29. The Preferred Spectrum Calculation Method credits Nextel in this EA market, and the Nextel Control Group generally, with more Total Spectrum than Nextel claims in its own calculations. Preferred's Total Spectrum calculation will be greater than Nextel's Total Spectrum figure for every EA market because it encompasses the entire EA market rather than only the more heavily urbanized or populated portions thereof. Interestingly enough, in this EA market, Preferred's MHz/Pops Equivalent Spectrum figure of 18.40 MHz approximates Nextel's published 18.55 MHz Total Spectrum figure. See Nextel

Since the *Report and Order* moves spectrum on a Total, rather than upon a MHz/Pops Equivalent basis, it moves all of the NCG's one hundred twenty (120) General Category EA- and Site-Licensed Channels (6 MHz) to the new Cellular Block. Presumably these Channels would be moved to and fully occupy the former NPSPAC Channels. The Nextel Control Group's one hundred eleven (111) B/ILT and Lower 80 Channels (5.55 MHz) would be modified by the Commission's reassigning to Nextel an identical number of frequencies in the 1.9 GHz band as part of the FCC's exclusive allocation to Nextel of a nationwide 10 MHz license in that frequency band. This result will hold true in the majority of the EA markets.⁵

2. *Allocation of 1.9 GHz Band Spectrum Exclusively to Nextel.*

Pursuant to the *Report and Order*, the FCC therefore allocates Nextel 5.55 MHz of 1.9 GHz band spectrum solely as the result of its 800 MHz band movement methodology, not as Nextel and the Consensus Parties repeatedly insisted in their respective filings, due to Nextel's returning its unrelated 700 MHz Guard Band holdings and promising to pay the total 800 MHz band relocation costs and its *pro rata* share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band.⁶ The *Report and Order*'s private sale of the remaining portion (4.45 MHz) of the 1.9 GHz band spectrum in exchange for: (a) Nextel's 700 MHz Guard Band holdings unrelated to any reorganization of the 800 MHz band; (b) secured promise to pay the total 800 MHz band relocation costs; and (c) promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band apparently was believed necessary by the

Communications, Inc., Reply Comments, August 7, 2002, Appendix I to Nextel Reply Comments in WT 02-55—Nextel's Available Spectrum in Top 320 Markets.

⁵ As discussed below, in the one hundred eighteen (118) EA markets where Nextel and Non-Nextel Control Group members share EA-Licensed Spectrum, the *Report and Order*'s use of Total Spectrum as the basis for its movement methodology necessarily results in serious practical and mathematical problems. As Preferred will demonstrate, absent Nextel's vacating a considerable number of 800 MHz Upper 200 Channels, which are the core of its system, or opening up the allocation of 1.9 GHz spectrum to other General Category and Lower 80 EA licensees, 800 MHz rebanding would be difficult, if not impossible to implement. See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, pp. 4-5; Southern Communication Services, Inc., Ex Parte Presentation, June 23, 2004, pp. 12-19. The Commission recognized and sought to address these problems by use of the *pro rata* distribution approach and separating 800 MHz rebanding from the allocation of 1.9 GHz band spectrum. As discussed below, this approach impermissibly discriminates against Non-Nextel Control Group EA and Cellular-Architecture System Site licensees in violation of the Due Process Clause to the Fifth Amendment to the U.S. Constitution and the FCC's statutory mandates to maintain regulatory parity and promote competition.

⁶ Since the *Report and Order* moves Nextel's General Category and Business and Industrial/ Land Transportation Site-Licensed Channels to the 1.9 GHz band on an EA market wide, Clean, 1:1 basis thus increasing the amount of 800 MHz band spectrum needing to be replaced by 1.9 GHz band spectrum to 6.1 MHz of such spectrum.

Commission to avoid (1) connecting the award of 1.9 GHz band to the movement and modification of the 800 MHz EA- and Site-Licensed Spectrum of General Category and Lower 80 EA licensees (2) triggering the otherwise mandatory competitive bidding provisions of Section 309(j) by providing a basis for the FCC's limiting the participation in the allocation of the 1.9 GHz band spectrum to only Nextel.

Pursuant to its Section 316 modification authority, in this EA market the FCC would allocate 5.55 MHz of 1.9 GHz band spectrum, rather than the nationwide "running average" of 4.50 MHz of the 1.9 GHz band spectrum to Nextel to replace that company's already-existing 800 MHz band spectrum. The award of such 1.9 GHz band spectrum to replace Nextel's already-existing 800 MHz band spectrum clearly would not involve the issuance of an "initial" license by the Commission implicating the competitive bidding provisions of Section 309(j).⁷ Under Sections 316, 301, 303 and 309(j)(6)(E), the Commission maintains in the *Report and Order* that it has the discretion to determine that it better serves the public interest to allow Nextel to purchase the remaining 4.45 MHz of 1.9 GHz band spectrum free from the filing of competing license applications.⁸ While this position appears meritorious if the FCC were allocating this remaining 1.9 GHz band spectrum to the class of licensees whose spectrum holdings were being modified and moved—General Category and Lower 80 EA and Cellular-Architecture System licensees, it clearly violates the Commission's statutory mandates under the to maintain regulatory parity and promote competition⁹ and the competitive bidding provisions of Section 309(j)¹⁰ by restricting participation in such allocation to a single entity within such class of licensees.¹¹

3. *Effect of Report and Order Upon Nextel's Total and Clean Spectrum.*

In the Sacramento, California EA market, prior to accommodating other Cellular Eligible Licensees, Nextel considerably increases its published Spectrum holdings from 18.55 MHz to 26.0 MHz, its MHz/Pops Equivalent Spectrum from 18.40

⁷ See *Report and Order*, at ¶¶ 65-68 & nn. 219-223.

⁸ See *Report and Order*, at ¶¶ 73-74.

⁹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 6002(d) (3) (B), 107 Stat. 397 (1993)(mandating that Commission establish a uniform regulatory regime for all commercial mobile services)("1993 Act"), 47 U.S.C. § 332 (c); Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 7994, at ¶ 4 (1994)("CMRS Third Report and Order"); 47 U.S.C. § 309(j)(3)(B) & (4)(C); 47 U.S.C. § 257; see also Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079, 19080, at ¶ 15, 19103, at ¶ 61 (1997).

¹⁰ See *Verizon Wireless White Paper*, at pp. 14-16 & n. 67.

¹¹ See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-6; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at pp. 37-38; Southern Communication Services, Inc., Ex Parte Presentation, June 23, 2004, at pp. 11-16.

MHz to 26.0 MHz, and its EA-Wide Spectrum from 16.50 MHz to 26.0 MHz.¹² These spectrum increases occur because the *Report and Order*'s (a) 800 MHz band movement methodology discussed immediately above and (b) the exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum.

4. *Increase in Value of Nextel's Spectrum Holdings (800 MHz and 1.9 GHz Band Spectrum).*

According to the *Report and Order*, the present average fair market value of Nextel's 800 MHz band spectrum to be exchanged as part of the Consensus Parties Proposal's movement methodology is \$1.61 MHz/Pop.¹³ The FCC further determined that the present fair market value of the 800 MHz and 1.9 GHz band spectrum Nextel would receive in exchange would be \$1.70 MHz/Pop.¹⁴

Applying these figures to the Sacramento, California EA market, the present value of the Nextel Control Group's 800 MHz band spectrum to be exchanged under the *Report and Order* would be determined by multiplying Nextel's one hundred sixty-eight (168) Channels, or 8.40 MHz of MHz/Pop Equivalent Spectrum, by the EA market's total population of 2,311,567 (2003 Pops) and then multiplying the resulting figure of 19,417,163 by \$1.61 MHz/Pop. The resulting figure of \$31,261,632 would be the present value of the 800 MHz band spectrum the Nextel Control Group would exchange in this EA market under the *Report and Order*. However, since under the *Report and Order*'s movement methodology, the NCG's EA- and Site-Licensed Spectrum moves on a Total Spectrum 1:1 basis, rather than upon a MHz/Pops Equivalent basis, the Nextel Control Group would receive a total of two hundred thirty-one (231) Clean 800 MHz (120 Channels in the former NPSPAC Channels) and 1.9 GHz band Channels (111 such Channels), or 11.55 MHz of such Spectrum, in exchange therefor. Nextel would receive an additional eighty-nine (89) Clean 1.9 GHz band Channels, or 4.45 MHz of such Spectrum, in exchange for its returning its 700 MHz Guard Band spectrum holdings, secured promise to pay the total 800 MHz band relocation costs and promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band.

¹² With the movement of Preferred's EA-Licensed Spectrum and AirPeak's EA- and Site-Licensed Spectrum into the one hundred forty (140) Upper 200 Channels to be vacated by Nextel, its Total, Clean or MHz/Pops Equivalent and Cellular Spectrum would be reduced by 7 MHz. Nextel therefore would hold 19.0 MHz of Total, Clean or MHz/Pops Equivalent and Cellular Spectrum in this EA market.

¹³ See *Report and Order*, at ¶¶ 314-323. The Commission determined that the present fair market value of the Nextel Control Group's General Category Channels was \$1.70 per MHz/Pop. Due primarily to the limited use by the NCG of its band edge channels to avoid interference with BILT and public safety licensees, the FCC applied a twelve and one-half percent (12.5%) discount and determined that the present fair market value of such Channels held by the NCG was \$1.4875 per MHz/Pop. See *id.*, at ¶ 318.

¹⁴ See *id.*, at ¶¶ 293-297.

Under the *Report and Order*, the fair market value of this Spectrum would be determined by multiplying 16 MHz of Clean Spectrum by the EA market's total population of 2,311,567, and then multiplying the resulting figure by \$1.70 MHz/Pop. The resulting figure of \$62,874,622 would be the fair market value of the Clean Spectrum the NCG would receive under the *Report and Order*. The \$31,612,990 difference in the fair market values of the spectrum to be exchanged under the *Report and Order* arguably is the amount of the Nextel Control Group's 800 MHz band spectrum enhancement.

5. *Effect of Report and Order Upon Non-Nextel EA and Cellular-Architecture Site Licensees' Spectrum Holdings.*

Preferred Communication Systems, Inc. ('Preferred') holds seventy-five (75) General Category EA Channels (3.75 MHz) in this EA market. Due to the presence of site-specific incumbents, Preferred's Channels cover 80.33% of this EA market's total population. Preferred therefore holds sixty (60) MHz/Pops Equivalent Channels. AirPeak Communications, LLC ("AirPeak") holds fifteen (15) Lower 80 EA Channels in this EA market. Due to the presence of site-specific incumbents, AirPeak's Channels cover 80% of this EA market's total population. AirPeak therefore holds twelve (12) 800 MHz/Pops Equivalent Channels. AirPeak also holds fifty (50) B/ILT Channels in this EA market.

Under paragraph 163 of the *Report and Order*, Preferred's and AirPeak's EA- and Site-Licensed Spectrum would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. As a result, their one hundred forty (140) channels presumably would move to the Upper 200 Channels in the new Cellular Block beginning with Channel 401 on an EA market wide, Clean 1:1 basis. Nextel would vacate these Channels but retain Channels 541-600 and its 900 MHz band spectrum in this EA market.¹⁵

Under the *Report and Order*, the value of this 800 MHz band spectrum vacated by Nextel would be determined by multiplying Nextel's one hundred forty (140) channels (7 MHz) by the EA market's total population of 2,311,567 (2003 Pops) and then multiplying the resulting figure of 16,180,969 by \$1.70 MHz/Pop.¹⁶ The resulting figure

¹⁵ See *Report and Order*, at ¶ 168 ("...a pro rata apportionment could reduce the number of channels available to Nextel. However, we observe that Nextel has additional spectrum at 900 MHz which can be used to offset the shortfall and is receiving spectrum at 1.9 GHz.") This conclusion is based upon the assumption that Nextel holds two hundred (200) Clean Channels within the Upper 200 Channels in this EA market. In this EA market that assumption proves to be correct. See Non-Nextel Site License Spreadsheet developed by Concepts To Operations, Inc., a RF engineering and consulting firm headquartered in Annapolis, Maryland, on Preferred's behalf and attached hereto as **Schedule 3** to its *Analysis of the Relocation of Non-Nextel SMR, BILT and Public Safety Site Licensees in Channels 1-150 and 401-600 Under the FCC's Report and Order* attached hereto as **Exhibit A**.

¹⁶ See *Report and Order*, at ¶¶ 321-322.

of \$27,507,647 would be the present value of the 800 MHz band spectrum in the Upper 200 Channels Nextel would vacate to facilitate the movement of the EA- and Site-Licensed Spectrum held by Non-Nextel EA and Cellular-architecture System Site Licensees in this EA market. Thus, even if Nextel vacates its one hundred forty (140) Channels in the Upper 200 Channels on an EA market Clean 1:1 basis to Preferred and AirPeak, it would realize a \$4,105,343 increase or enhancement of its spectrum holdings in this EA market.

6. Effect of Report and Order Upon Other 800 MHz Licensees' Spectrum Holdings.

Under the *Report and Order*, the Site Channels held by other Non-Nextel Control Group licensees in the General Category Channels (Channels 1-150) and in the Upper 200 Channels would move to the forty-six (46) Interleave and sixty-five (65) Lower 80 Channels to be vacated by the NCG. In this EA market, other Non-Nextel Control Group licensees hold thirty-one (31) General Category Site Channels. Other Non-Nextel Control Group licensees do not hold any Site Channels in the Upper 200 Channels.¹⁷ According to the *Report and Order*, these Site Channels would receive comparable facilities and their present geographic "footprint."

7. Effect of Adoption of Preferred's Improvements.

If the FCC determines to adopt Preferred's Improvements set forth in the it's accompanying comment, Channels 1-25 of the General Category EA Authorizations held by Preferred would move to Channels 576-600 of the Upper 200 Channels held by Nextel, and available to be vacated, on an EA market wide Clean 1:1 basis. Preferred's remaining fifty (50) General Category EA Channels would move to Channels 601-650 of the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under Preferred's Improvements, AirPeak would have the option of moving its fifteen (15) Lower 80 EA Channels to either (1) the 1.9 GHz band or (2) Channels 561-575 of the Upper 200 Channels held by Nextel, and available to be vacated, on an EA market wide Clean 1:1 basis. Since AirPeak complies with the condition set forth for moving its Site Channels to the new Cellular Block on an EA market wide, Clean 1:1 basis, it would have the election to move its fifty (50) Site Channels in this EA market either to (1) the 1.9 GHz band or (2) Channels 511-560 of the Upper 200 Channels held by Nextel, and available to be vacated, on a MHz/Pops Equivalent basis.

¹⁷ These figures are based upon the Commission's nationwide 800 MHz Private Land Mobile radio database downloaded by Concepts To Operations, Inc., a RF Engineering and System Design firm headquartered in Annapolis, Maryland ("CTO"). CTO summarized the license database in the Non-Nextel Site Licenses Spreadsheet attached hereto as **Schedule 3** hereto. CTO has acted as a consulting firm to Preferred in this proceeding.

Under such approach, Nextel would move its seventy-five (75) General Category EA Channels to the former NPSPAC Channels on an EA market wide Clean 1:1 basis. If AirPeak elects to move its sixty-five (65) Lower 80 EA and Site Channels to the Upper 200 Channels held by Nextel, and available to be vacated, Nextel would hold sixty-five (65) fewer Channels within the Upper 200 Channels. Nextel therefore would retain seventy-five (75) additional Channels within the Upper 200 Channels than it would under the *Report and Order*.

Under Preferred's Improvements, both Nextel's sixty-five (65) Upper 200 and Lower 80 EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Its General Category and B/ILT Site Channels would move to the 1.9 GHz band on a MHz/Pops Equivalent basis. Nextel therefore would move such Site Channels to the 1.9 GHz band for thirty (30) Channels in the 1.9 GHz band on an EA market wide and Clean basis. Nextel therefore would hold one hundred ninety-five (195) Channels, or 9.4 MHz, rather than the nationwide "running average" of 4.5 MHz of such 1.9 GHz band spectrum on an EA market wide and Clean basis as replacement spectrum for its vacated 800 MHz band spectrum.

Under such approach, in this EA market the FCC would award the remaining forty (40) Channels or 1.6 MHz of 1.9 GHz band spectrum by a private sale or other means. However, unlike under the *Report and Order*, Preferred's Improvements would expand the eligibility to participate in the allocation of such 1.9 GHz band spectrum to the entire class of General Category and Lower 80 EA licensees whose EA- and Site-Licensed Spectrum was moved and modified in this proceeding. Licensees within such class who would forego reimbursement of their own relocation costs, such as Nextel Partners apparently is willing to do, would be entitled to receive an allocation of 1.9 GHz band spectrum on an EA market wide and Clean basis. Preferred already has indicated in several previous filings that it would be willing to forego reimbursement of its relocation costs in exchange for an allocation of 1.9 GHz band spectrum in the EA markets in which it holds EA Authorizations. Absent AirPeak's or another Non-Nextel Control Group EA licensee's foregoing reimbursement of its relocation costs, Preferred would seek an allocation of the forty (40) Channels or 2.00 MHz of 1.9 GHz band spectrum in this EA market. Such award of 1.9 GHz band spectrum would not violate the otherwise mandatorily competitive bidding provisions of Section 309(j) since the Commission has the authority under Section 309(j)(6)(E) to avoid mutual exclusivity and would not violate the FCC's statutory mandates to maintain regulatory parity and promote competition.

8. *Conclusion.*

Under the *Report and Order's* approach, the NCG increases its published Total Spectrum figure, its MHz/Pops Equivalent and its EA-wide Spectrum in this EA market increases.¹⁸ With Nextel's vacating one hundred forty (140) channels in the

¹⁸ In addition to the 800 MHz and 1.9 GHz Spectrum Nextel is to receive FCC amended its rules so that Nextel could use its 900 MHz Band Spectrum holdings to offer CMRS.

Upper 200 Channels in the new Cellular Block, the Nextel Control Group would hold three hundred eighty (380) total and Clean 800 MHz and 1.9 GHz band channels (19 MHz) as compared to the three hundred and seventy-one (371) published Total, and three hundred sixty-eight (368) Clean, channels it presently holds. According to the *Report and Order*, the value of the 800 MHz and 1.9 GHz band spectrum the Nextel Control Group would receive in this EA market would exceed the value of the 800 MHz band spectrum it would vacate by \$13,852,066 (the value of the spectrum Nextel would receive would be determined by multiplying 2,311,567 Pops (2003 figure) by (a) 13.5 MHz of 800 MHz and 1.9 GHz Band spectrum; the resulting figure of 31,206,155 is then multiplied by (b) \$1.70 per MHz/Pop producing a figure of \$53,050,463; the value of the spectrum Nextel would vacate would be determined by multiplying the Pops figure by (a) 4.4 MHz of 800 MHz Band spectrum (Interleave Channels) and (b) 7 MHz of 800 MHz Band spectrum¹⁹; the resulting figures of (a) 10,170,882 and (b) 16,180,969 are then multiplied respectively by (a) \$1.4875 per MHz/Pop and (b) \$1.70 per MHz/Pop producing a figure of \$42,636,834; the difference between \$53,050,463 and \$42,636,834, or \$10,413,629 would be the amount of Nextel's spectrum enhancement in this EA market.

The Non-Nextel EA and Cellular-Architecture System Licensees in this EA market experience an increase in their respective MHz/Pops Equivalent Channels. Preferred's and AirPeak's Clean Spectrum, respectively, increases from sixty (60) (3 MHz) to seventy-five (75) (3.75 MHz) Channels and from (52) (2.60 MHz) Channels to sixty-five (65) (3.25 MHz) Channels. Since their EA-Licensed and Site-Licensed Spectrum moves on a Total, rather MHz/Pops Equivalent Channels basis, these Licensees' Total Channels remain unchanged.

NEXTEL AFTER REBANDING					Airpeak/PCSI
	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S	CELLULAR ELIGIBLE FREQ'S
UPPER 200	60	100%	3.0	60	140
6 MHz SMR (NSPAC)	120	100%	6.0	120	0
10 MHz (1.9 GHz)	200	100%	10.0	200	0
TOTAL	380	100%	19.0	380	0

NEXTEL BEFORE AND AFTER PICTURE

Moreover, the Commission's amendment permitted other licensees holding such Spectrum to sell or otherwise assign their respective holdings to Nextel for CMRS use. See *Report and Order*, at ¶ 6. According to Nextel's published figures, on a nationwide "running average" basis Nextel's Total, MHz/Pops Equivalent and EA-Wide Spectrum therefore would increase by approximately seventy-two (72) channels, or 3.6 MHz.

¹⁹ These figures would include the eighty-eight (88) Clean or MHz/Pops Equivalent Interleaved Channels' spectrum (Lower 80 and BILT Channels) and the one hundred forty (140) EA market wide Clean Upper 200 Channels to be vacated by Nextel.

	BEFORE	AFTER
TOTAL CHANNELS	371	380
MHZ/POPS EQUIVALENT	18.4	19.0
EA-WIDE FREQ'S (MHZ)	16.5	19.0

**PREFERRED & AIRPEAK
BEFORE AND AFTER
PICTURE**

	BEFORE	AFTER
TOTAL CHANNELS	140	140
CELLULAR ELIGIBLE	7.0	7.0
EA-WIDE FREQ'S (MHZ)	4.5	7.0

**NEXTEL AFTER
REBANDING—ADOPTION
OF IMPROVEMENTS**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200	135	100%	6.75	135
6 MHz SMR (NSPAC)	45	100%	2.25	45
10 MHz (1.9 GHz)	195	100%	9.75	195
TOTAL	375	100%	18.75	375

Airpeak/PCSI

CELLULAR ELIGIBLE FREQ'S
65
75
5
145

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	371	375
MHZ/POPS EQUIVALENT	18.55	18.75
EA-WIDE FREQ'S (MHZ)	16.5	18.75

**PREFERRED & AIRPEAK
BEFORE AND AFTER
PICTURE**

	BEFORE	AFTER
TOTAL CHANNELS	140	145
MHZ/POPS EQUIVALENT	7.0	7.25
EA-WIDE FREQ'S (MHZ)	4.5	7.25

- b. Spectrum Holdings in the Washington-Baltimore, D.C.-Maryland, Virginia-West Virginia-Pennsylvania EA Market.

As set forth in the Chart immediately below, Nextel holds fifty (50) General Category EA-Licensed frequencies covering an average of 99.00% of the Washington-Baltimore, D.C.-Maryland-Virginia-West Virginia-Pennsylvania EA market's total population, or the equivalent of seventy-four (74) Channels of Clean Spectrum. Likewise, due to its eighty (80) Lower 80 EA frequencies covering an average of 98.90% of the EA market's total population, Nextel would hold the equivalent of eighty (80) Channels of Clean Spectrum. Nextel holds thirty-three (33) Business Category Channels in this EA market. Pursuant to the Commission's decision allowing SMR licensees to purchase such Channels and convert them to CMRS, these Channels would be included. Due to these frequencies' covering an average of 54.00% of the total population, Nextel would hold the equivalent of eighteen (18) Channels of Clean Spectrum.

MARKET BEA013 WASHINGTON-BALTIMORE, DC-MD-VA-WV-PA EA MARKET

NEXTEL CHANNELS SUMMARY

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S	PCSI CELLULAR ELIGIBLE FREQ'S
SMR GC EA	50	75.85%	38	50	100
SMR GC SITE	73	50.00%	36		
SMR L80 EA	80	99.74%	80	80	
SMR L80 SITE	0	0.00%	0		
B/ILT	33	54.00%	18		
PS	0	0.00%	0		
SUBTOTALS (Freq's)	236		172	130	100
SUBTOTALS (MHz)	11.80		8.60	6.50	5.00
SMR U200 EA	200	99.72%	199	200	0.0
SMR U200 SITE	0		0		
SUBTOTALS (Freq's)	200		199	200	0
SUBTOTALS (MHz)	10.00		9.99	10.00	0.00
TOTALS (Freq's)	436		371	330	0
TOTALS (MHz)	21.80		18.55	16.50	5.00
	CHANNELS	MHz			
NEXTEL Published	355	17.75			

1. *Report and Order's Movement Methodology: (a) move the Nextel Control Group's General Category EA- and Site-Licensed Spectrum to the new Cellular Block on an EA market wide Clean 1:1 basis; (b) credit Nextel with a nationwide "running average" of the General Category, Interleave and Lower 80 Channels vacated by it, Nextel Partners and licensees which have executed a management or purchase option agreement with it and modify such spectrum by reassigning to Nextel 4.5 MHz of 1.9 GHz band spectrum; (c) move the Non-NCG's EA and Cellular-architecture Systems Site Licensees' EA-Licensed Spectrum to the new Cellular Block on an EA market wide, Clean 1:1 basis; however such Licensees' Site-Licensed Spectrum would move to the new Cellular Block on such basis only if (1) it is located in an EA market in which such Licensee holds an EA Authorization and (2) the Non-Nextel Control Group EA or Cellular-architecture System Site Licensee is using such Site-Licensed Spectrum as part of a Cellular-architecture System as of the date of the publication of the Report and Order in the Federal Register.*

Due to the presence of site-specific incumbents, the Nextel Control Group holds one hundred seventy-two (172) MHz/Pops Equivalent Lower 230 Channels. Upon their movement under the *Report and Order*, the NCG would be allocated two hundred thirty-six (236) Channels on a Clean basis, a net gain of sixty-four (64) MHz/Pops Equivalent Channels. As noted in Preferred's Ex Parte Presentation filed on March 2, 2004, this result appears to belie the oft-repeated argument by the Consensus Parties that their Proposal involves only a "kHz-for-kHz exchange" or "replacement spectrum."²⁰ As noted above, under the *Report and Order*, this result will hold true in a majority of the 175 EA markets.

Since the *Report and Order* moves spectrum on a Total, rather than upon a MHz/Pops Equivalent basis, it moves one hundred twenty (120) (6 MHz) of the NCG's seventy-four (74) General Category EA- and Site-Licensed Channels (3.7 MHz) to the former NPSPAC Channels. The NCG's one hundred thirteen (113) B/ILT and Lower 80 Channels (5.65 MHz) would be modified by the Commission's reassigning to Nextel an identical number of frequencies in the 1.9 GHz band as part of the FCC's exclusive allocation to Nextel of a nationwide 10 MHz license in that frequency band. As noted above, this result will hold true in a majority of the EA markets.²¹

2. *Allocation of 1.9 GHz Band Spectrum Exclusively to Nextel.*

Pursuant to the *Report and Order*, the FCC therefore allocates Nextel 5.80 MHz of 1.9 GHz band spectrum solely as the result of its 800 MHz band movement

²⁰ See n. 4 *supra*. Interestingly enough, in this EA market, Preferred's MHz/Pops Equivalent Spectrum figure of 18.55 MHz exceeds Nextel's published Total Spectrum figure of 17.75 MHz.

²¹ See n. 5 *supra*.

methodology, not as Nextel and the Consensus Parties repeatedly insisted in their respective filings, due to Nextel's returning its unrelated 700 MHz Guard Band holdings and promising to pay the total 800 MHz band relocation costs and pro rata share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band.²² The *Report and Order*'s sale of the remaining portion (4.20 MHz) of the 1.9 GHz band spectrum in exchange for (a) Nextel's 700 MHz Guard Band holdings unrelated to any reorganization of the 800 MHz band; (b) secured promise to pay the total 800 MHz band relocation costs; and (c) promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band apparently was believed necessary by the Commission to avoid (1) connecting the award of 1.9 GHz band to the movement and modification of the 800 MHz EA- and Site-Licensed Spectrum of General Category and Lower 80 EA licensees (2) triggering the otherwise mandatory competitive bidding provisions of Section 309(j) by providing a basis for the FCC's limiting the participation in the allocation of the 1.9 GHz band spectrum to only Nextel.

Pursuant to its Section 316 modification authority, in this EA market the FCC would allocate 5.80 MHz of the 1.9 GHz band spectrum to Nextel to replace that company's already-existing 800 MHz band spectrum. As noted above, the award of such 1.9 GHz band spectrum therefore clearly would not involve the issuance of an "initial" license by the Commission implicating the competitive bidding provisions of Section 309(j).²³ Under Sections 316, 301, 303 and 309(j)(6)(E), the Commission maintains in the *Report and Order* that it has the discretion to determine that it better serves the public interest to allow Nextel to purchase the remaining 4.20 MHz of 1.9 GHz band spectrum free from the filing of competing license applications.²⁴ While this position appears meritorious if the FCC were allocating this remaining 1.9 GHz band spectrum to the class of licensees whose spectrum holdings were being modified and moved—General Category and Lower 80 EA licensees, it clearly violates the Commission's statutory mandates under the to maintain regulatory parity and promote competition²⁵ and the competitive bidding provisions of Section 309(j)²⁶ by restricting participation in such allocation to a single entity within such class of licensees.²⁷

3. *Effect of Report and Order Upon Nextel's Total and Clean Spectrum.*

In the Washington-Baltimore, D.C.-Maryland-Virginia-West Virginia-Pennsylvania EA market, Nextel considerably increases its Total Published Spectrum from 17.75 MHz to 26.0 MHz, its MHz/Pops Equivalent Spectrum from 18.55 MHz to 26.0 MHz, and its EA-Wide Spectrum from 16.50 MHz to 26.0 MHz.²⁸ These spectrum

²² See n. 6 *supra*.

²³ See n. 7 *supra*.

²⁴ See n. 8 *supra*.

²⁵ See n. 9 *supra*.

²⁶ See n. 10 *supra*.

²⁷ See n. 11 *supra*.

²⁸ With the movement of Preferred's EA-Licensed Spectrum into the one hundred (100) Upper 200 Channels to be vacated by Nextel, its Total, Clean or MHz/Pops Equivalent

increases occur because the *Report and Order's* (a) 800 MHz band movement methodology discussed immediately above and (b) the exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum.

4. *Increase in Value of Nextel's Spectrum Holdings (800 MHz and 1.9 GHz Band Spectrum).*

According to the Report and Order, the present average fair market value of Nextel's 800 MHz band spectrum to be exchanged as part of the Consensus Parties Proposal's movement methodology is \$1.61 MHz/Pop.²⁹ The FCC further determined that the present fair market value of the 800 MHz and 1.9 GHz band spectrum Nextel would receive in exchange therefor would be \$1.70 MHz/Pop.³⁰

Applying these figures to the Washington-Baltimore, D.C.-Maryland-Virginia-West Virginia-Pennsylvania EA market, the present value of the Nextel Control Group's 800 MHz band spectrum to be exchanged under the *Report and Order* would be determined by multiplying Nextel's one hundred seventy-two (172) Channels, or 8.60 MHz/Pops Equivalent Spectrum, by the EA market's total population of 8,400,923 (2003 Pops) and then multiplying the resulting figure of 72,247,938 by \$1.61 MHz/Pop. The resulting figure of \$116,319,180 would be the present value of the 800 MHz band spectrum Nextel would exchange in this EA market under the *Report and Order*. However, since under the *Report and Order's* movement methodology, the NCG's EA- and Site-Licensed Spectrum moves on a Total Spectrum 1:1 basis, rather than upon a MHz/Pops Equivalent basis, the NCG would receive a total of two hundred thirty-six (236) Clean 800 MHz (120 Channels in the former NPSPAC Channels) and 1.9 GHz band Channels (116 such Channels), or 11.80 MHz of such Spectrum, in exchange therefor. Nextel would receive an additional eighty-four (84) Clean 1.9 GHz band Channels, or 4.20 MHz of such Spectrum, in exchange for its returning its 700 MHz Guard Band spectrum holdings, secured promise to pay the total 800 MHz band relocation costs and promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band.

Under the *Report and Order*, the fair market value of this Spectrum would be determined by multiplying 16 MHz of Clean Spectrum by the EA market's total population of 8,400,923, and then multiplying the resulting figure by \$1.70 MHz/Pop. The resulting figure of \$228,505,106 would be the fair market value of the Clean Spectrum the Nextel Control Group would receive under the *Report and Order*. The \$112,185,926 difference in the fair market values of the spectrum to be exchanged under the *Report and Order* is the amount of the NCG's 800 MHz band spectrum enhancement.

and Cellular Spectrum set forth immediately above would be reduced by 5.0 MHz. Nextel therefore would hold 21.0 MHz of Total, Clean or MHz/Pops Equivalent and Cellular Spectrum in this EA market.

²⁹ See n. 13 *supra*.

³⁰ See n. 14 *supra*.

5. *Effect of Report and Order Upon Non-Nextel EA and Cellular-architecture Site Licensees' Spectrum Holdings.*

Preferred Communication Systems, Inc. ('Preferred') holds one hundred (100) General Category EA Channels (5 MHz) in this EA market. Due to the presence of site-specific incumbents, Preferred's Channels cover 49.75% of this EA market's total population. Preferred therefore holds fifty (50) MHz/Pops Equivalent Channels.

Under paragraph 163 of the *Report and Order*, Preferred's EA- and Site-Licensed Spectrum would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. As a result, its one hundred (100) channels presumably would move to the Upper 200 Channels in the new Cellular Block beginning with Channel 401 on an EA market wide, Clean 1:1 basis. Nextel would vacate these Channels but retain Channels 501-600 and its 900 MHz band spectrum in this EA market.³¹

Under the *Report and Order*, the value of this 800 MHz band spectrum vacated by Nextel would be determined by multiplying Nextel's one hundred (100) channels (5 MHz) by the EA market's total population of 8,400,923 (2003 Pops) and then multiplying the resulting figure of 42,004,615 by \$1.70 MHz/Pop.³² The resulting figure of \$71,407,846 would be the present value of the 800 MHz band spectrum in the Upper 200 Channels Nextel would vacate to facilitate the movement of the EA- and Site-Licensed Spectrum held by the Non-Nextel Licensee in this EA market. Thus, even if Nextel vacates its one hundred (100) Channels in the Upper 200 Channels on an EA market Clean 1:1 basis to Preferred, it would realize a \$40,778,080 increase or enhancement of its spectrum holdings in this EA market.

6. *Effect of Report and Order Upon Other 800 MHz Licensees' Spectrum Holdings*

Under the *Report and Order*, the Site Channels held by other Non-Nextel Control Group licensees in the General Category Channels (Channels 1-150) and in the Upper 200 Channels would move to the thirty-three (33) Interleave and eighty (80) Lower 80 Channels to be vacated by the NCG. In this EA market, other Non-Nextel licensees hold one hundred forty-six (146) General Category Site Channels. Other Non-Nextel licensees hold fifty-four (54) Site Channels in the Upper 200 Channels.³³ According to the *Report and Order*, these Site Channels would receive comparable facilities and their present geographic "footprint." A total of two hundred (200) General

³¹ See n. 15 *supra*. This conclusion is based upon the assumption that Nextel holds two hundred (200) Clean Channels within the Upper 200 Channels in this EA market. However, according to the Non-Nextel Site License Spreadsheet developed by CTO on Preferred's behalf and attached hereto as **Schedule 3**, Nextel holds only one hundred forty-six (146) Clean Channels in the Upper 200 Channels in the Washington-Baltimore, DC-Maryland-Virginia-West Virginia-Pennsylvania EA market.

³² See n. 16 *supra*.

³³ See n. 17 *supra*.

Category and Upper 200 Site Channels therefore would be moved into one hundred thirteen (113) Interleave and Lower 80 Channels to be vacated by Nextel on a geographic “footprint” basis. While Nextel’s Lower 80 Channels cover an average of 100% of the EA market’s population, its BILT Channels cover an average of only 54% of this EA market’s population. If the average geographical “footprint” of the General Category and Upper 200 Site Channels is greater than Nextel’s BILT Channels to be vacated, insufficient spectrum would be available to accommodate the movement of the Site Channels held by Non-Nextel licensees in this EA market.³⁴

7. *Effect of Adoption of Preferred’s Improvements.*

If the FCC determines to adopt Preferred’s Improvements set forth in the Overview to this First Request For Clarifications, Channels 1-25 of the General Category EA Authorizations held by Preferred would move to Channels 576-600 of the Upper 200 Channels held by Nextel, and available to be vacated, on an EA market wide Clean 1:1 basis. Preferred’s remaining seventy-five (75) General Category EA Channels would move to Channels 601-675 of the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under Preferred’s Improvements, Nextel would move its forty-five (45) General Category EA Channels to the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under such approach, both Nextel’s twenty-five (25) Upper 200 and eighty (80) Lower 80 EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Its General Category and B/ILT Site Channels would move to the 1.9 GHz band on a MHz/Pops Equivalent basis. Nextel therefore would move such Site Channels to the 1.9 GHz band for fifty-four (54) Channels in the 1.9 GHz band on an EA market wide and Clean basis. Nextel therefore would hold one hundred sixty-four (164) Channels, or 8.2 MHz, rather than the nationwide “running average” of 4.5 MHz of such 1.9 GHz band spectrum on an EA market wide and Clean basis as replacement spectrum for its vacated 800 MHz band spectrum.

Under Preferred’s Improvements, in this EA market the FCC would award the remaining thirty-six (36) Channels or 1.8 MHz of 1.9 GHz band spectrum by a private sale or other means. However, unlike under the *Report and Order*, Preferred’s Improvements would expand the eligibility to participate in the allocation of such 1.9 GHz band spectrum to the entire class of General Category and Lower 80 EA licensees whose EA- and Site-Licensed Spectrum was moved and modified in this proceeding. Licensees within such class who would forego reimbursement of their own relocation costs, such as Nextel Partners apparently is willing to do, would be entitled to receive an

³⁴ See *id*; see also Concepts To Operations, Inc., *Analysis of the Relocation of Non-Nextel SMR, BILT and Public Safety Site Licensees in Channels 1-150 and 401-600 Under the FCC’s Report and Order*, attached hereto as **Exhibit A**. To Preferred’s knowledge, neither Nextel nor the Consensus Parties ever addressed this issue in their filings in this proceeding.

allocation of 1.9 GHz band spectrum on an EA market wide and Clean basis. Preferred already has indicated in several previous filings that it would be willing to forego reimbursement of its relocation costs in exchange for an allocation of 1.9 GHz band spectrum in the EA markets in which it holds EA Authorizations. Absent AirPeak's or another Non-Nextel Control Group EA licensee's foregoing reimbursement of its relocation costs, Preferred would seek an allocation of the thirty-six (36) Channels or 1.8 MHz of 1.9 GHz band spectrum in this EA market. Such award of 1.9 GHz band spectrum would not violate the otherwise mandatorily competitive bidding provisions of Section 309(j) since the Commission has the authority under Section 309(j)(6)(E) to avoid mutual exclusivity and would not violate the FCC's statutory mandates to maintain regulatory parity and promote competition.

8. Conclusion.

Under the *Report and Order's* approach, while the NCG suffers a decrease in its Total Spectrum in this EA market, its MHz/Pops Equivalent or Clean Spectrum in this EA market increases. With Nextel's vacating one hundred (100) channels in the Upper 200 Channels in the new Cellular Block, it would hold four hundred twenty (420) total and Clean 800 MHz and 1.9 GHz band channels (19 MHz) as compared to the three hundred and fifty-five (355) Total Published, and three hundred seventy-one (371) MHz/Pops equivalent channels it presently holds. According to the *Report and Order*, the value of the 800 MHz and 1.9 GHz band spectrum the Nextel Control Group would receive in this EA market would exceed the value of the 800 MHz band spectrum it would vacate by \$60,161,109 (the value of the spectrum Nextel would receive would be determined by multiplying 8,400,923 Pops (2003 figure) by (a) 13.5 MHz of 800 MHz and 1.9 GHz Band spectrum; the resulting figure of 113,412,461 is then multiplied by (b) \$1.70 per MHz/Pop producing a figure of \$192,801,183; the value of the spectrum Nextel would vacate would be determined by multiplying the Pops figure by (a) 4.9 MHz of 800 MHz Band Spectrum (Interleaved Channels) and (b) 5 MHz of 800 MHz Band Spectrum (Upper 200 Channels)³⁵; the resulting figures of (a) 41,164,523 and (b) 42,004,615 then respectively multiplied by (c) \$1.4875 per MHz/Pop (d) \$1.70 per MHz/Pop producing a figure of \$132,640,074; the difference between \$192,801,183 and \$132,640,074, or \$60,161,109.

The Non-Nextel EA in this EA market experiences an increase in their respective MHz/Pops Equivalent Channels. Preferred's Clean Spectrum, respectively, increases from fifty (50) (2.5 MHz) to one hundred (100) (5 MHz) Channels. Since its EA-Licensed Spectrum moves on a Total, rather MHz/Pops Equivalent Channels basis, its number of Total Channels remains unchanged.

NEXTEL AFTER REBANDING					PCSI CELLULAR
	TOTAL	% OF	MHz/POPS	EA-WIDE	

³⁵ These figures would include both the ninety-eight (98) Clean or MHz/Pops Equivalent Interleaved Channels' Spectrum (Lower 80 and BILT Channels) and the one hundred (100) EA market wide Clean Upper 200 Channels to be vacated by Nextel.

	FREQ'S	POPS	EQUIVALENT	FREQ'S	ELIGIBLE FREQ'S
UPPER 200	100	100%	5.0	100	100
6 MHz SMR (NSPAC)	120	100%	6.0	120	0
10 MHz (1.9 GHz)	200	100%	10.0	200	0
TOTAL	420	100%	21.0	420	5

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	355	420
MHZ/POPS EQUIVALENT	18.55	21.0
EA-WIDE FREQ'S (MHZ)	16.5	21.0

PREFERRED BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	100	100
MHZ/POPS EQUIVALENT	2.50	5.00
EA-WIDE FREQ'S (MHZ)	5.00	5.00

NEXTEL AFTER REBANDING— IMPROVEMENTS

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200	175	100%	8.75	175
6 MHz SMR (NSPAC)	45	100%	1.0	45
10 MHz (1.9 GHz)	164	100%	7.55	164
TOTAL	384	100%	17.3	384

PCSI

CELLULAR ELIGIBLE FREQ'S
25
75
36
136

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	355	384
MHZ/POPS EQUIVALENT	18.55	19.2
EA-WIDE FREQ'S (MHZ)	16.5	19.2

PREFERRED BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	100	136

MHZ/POPS EQUIVALENT	2.50	5.00
CELLULAR SPECTRUM (MHZ)	5.00	6.8

a. Spectrum Holdings in the Atlanta, Georgia-Alabama-North Carolina EA Market.

As set forth in the Chart immediately below, Nextel holds twenty-five (25) General Category EA-Licensed frequencies covering an average of 74.27% of the EA market's total population, or the equivalent of nineteen (19) Channels of Clean Spectrum. Likewise, due to its sixty (60) Lower 80 EA frequencies covering an average of 81.59% of the EA market's total population, Nextel would hold the equivalent of forty-nine (49) Channels of Clean Spectrum. Nextel holds nine (9) Business Category Channels in this EA market. Pursuant to the Commission's decision allowing SMR licensees to purchase such Channels and convert them to CMRS, these Channels would be included. Due to these frequencies' covering an average of 45.99% of the total population, Nextel would hold the equivalent of four (4) Channels of Clean Spectrum.

**MARKET BEA040 ATLANTA, GA-AL-NC EA MARKET
NEXTEL CHANNELS SUMMARY**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S	SOUTHERN CELLULAR ELIGIBLE FREQ'S
SMR GC EA	25	74.87%	19	25	125
SMR GC SITE	91	25.35%	23		13
SMR L80 EA	60	81.59%	49	80	20
SMR L80 SITE	20	77.59%	16		
B/ILT	9	45.99%	4		93
PS	0	0.00%	0		
SUBTOTALS (Freq's)	205		111	105	251
SUBTOTALS (MHz)	10.25		5.55	5.25	12.55
SMR U200 EA	200	91.09%	182	200	0.0
SMR U200 SITE	0		0		
SUBTOTALS (Freq's)	200		182	200	0
SUBTOTALS (MHz)	10.00		9.10	10.00	0.00
TOTALS (Freq's)	405		293	305	251
TOTALS (MHz)	21.80		14.65	15.25	12.55
	CHANNELS	MHz			
NEXTEL Published	292	14.60			

(1) *Report and Order's Movement Methodology*: (a) move the Nextel Control Group's General Category EA- and Site-Licensed Spectrum to the new Cellular Block on an EA market wide Clean 1:1 basis; (b) credit Nextel with a nationwide "running average" of the General Category, Interleave and Lower 80 Channels vacated by it, Nextel Partners and licensees which have executed a management or purchase option agreement with it and modify such spectrum by reassigning to Nextel 4.5 MHz of 1.9 GHz band spectrum; (c) move the Non-NCG's EA and Cellular-architecture Systems Site Licensees' EA-Licensed Spectrum to the new Cellular Block on an EA market wide, Clean 1:1 basis; however such Licensees' Site-Licensed Spectrum would move to the new Cellular Block on such basis only if (1) it is located in an EA market in which such Licensee holds an EA Authorization and (2) the Non-Nextel Control Group EA or Cellular-architecture System Site Licensee is using such Site-Licensed Spectrum as part of a Cellular-architecture System as of the date of the publication of the Report and Order in the Federal Register.

Due to the presence of site-specific incumbents, the NCG holds one hundred eleven (111) MHz/Pops Equivalent Lower 230 Channels. Upon their movement under the *Report and Order*, the Nextel Control Group would be allocated two hundred five (205) Channels on a Clean basis, a net gain of ninety-four (94) MHz/Pops Equivalent Channels. As noted in Preferred's Ex Parte Presentation filed on March 2, 2004, this result appears to belie the oft-repeated argument by the Consensus Parties that their Proposal involves only a "kHz-for-kHz exchange" or "replacement spectrum."³⁶ As noted above, under the *Report and Order*, this result will hold true in a majority of the 175 EA markets.³⁷

Since the *Report and Order* moves spectrum on a Total, rather than upon a MHz/Pops Equivalent basis, it moves the NCG's one hundred twenty (120) (6 MHz) of the NCG's two hundred five (205) (10.25 MHz) General Category and Lower 80 EA- and Site-Licensed Channels and BILT Channels to the former NPSPAC Channels.

2. *Allocation of 1.9 GHz Band Spectrum Exclusively to Nextel.*

Under the *Report and Order*, therefore, Nextel would be allocated 4.25 MHz of the 1.9 GHz band spectrum solely as the result of its 800 MHz band movement methodology. The *Report and Order* therefore would sell 5.75 MHz of the 1.9 GHz band spectrum in this EA market to Nextel in exchange for (a) Nextel's 700 MHz Guard Band holdings unrelated to any reorganization of the 800 MHz band; (b) secured promise to pay the total 800 MHz band relocation costs; and (c) promise to pay its pro rate share of

³⁶ See n. 4 *supra*. Interestingly enough, in this EA market, Preferred's MHz/Pops Equivalent Spectrum figure of 14.65 MHz slightly exceeds Nextel's published Total Spectrum figure of 14.60 MHz.

³⁷ See n. 5 *supra*.

UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band apparently was believed necessary by the Commission to avoid (c) connecting the award of 1.9 GHz band to the movement and modification of the 800 MHz EA- and Site-Licensed Spectrum of General Category and Lower 80 EA licensees (b) triggering the otherwise mandatory competitive bidding provisions of Section 309(j) by providing a basis for the FCC's limiting the participation in the allocation of the 1.9 GHz band spectrum to only Nextel.

Pursuant to its Section 316 modification authority, in this EA market the FCC would allocate 4.25 MHz of 1.9 GHz band spectrum to Nextel to replace that company's already-existing 800 MHz band spectrum. As was the case in the Sacramento and Washington-Baltimore EA markets, the award of such 1.9 GHz band spectrum in this EA would not involve the issuance of an "initial" license by the Commission implicating the competitive bidding provisions of Section 309(j).³⁸ Under Sections 316, 301, 303 and 309(j)(6)(E), the Commission maintains in the *Report and Order* that it has the discretion to determine that it better serves the public interest to allow Nextel to purchase the 10 MHz of 1.9 GHz band spectrum free from the filing of competing license applications.³⁹ While this position appears meritorious if the FCC were allocating this remaining 1.9 GHz band spectrum to the class of licensees whose spectrum holdings were being modified and moved—General Category and Lower 80 EA licensees, it clearly violates the Commission's statutory mandates under the to maintain regulatory parity and promote competition⁴⁰ and the competitive bidding provisions of Section 309(j)⁴¹ by restricting participation in such allocation to a single entity within such class of licensees.⁴²

3. *Effect of Report and Order Upon Nextel's Total and Clean Spectrum.*

In the Atlanta, Georgia-Alabama-North Carolina EA market, Nextel considerably increases its Total Published Spectrum from 14.60 MHz to 26.0 MHz, its MHz/Pops Equivalent Spectrum from 14.65 MHz to 26.0 MHz, and its CMRS Cellular Service Eligible Spectrum from 14.25 MHz to 26.0 MHz.⁴³ These spectrum increases occur because the *Report and Order's* (a) 800 MHz band movement methodology discussed immediately above and (b) the exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum.

³⁸ See n. 7 *supra*.

³⁹ See n. 8 *supra*.

⁴⁰ See n. 9 *supra*.

⁴¹ See n. 10 *supra*.

⁴² See n. 11 *supra*.

⁴³ With the movement of Southern's EA- and Site-Licensed Spectrum into the one hundred forty (140) Upper 200 Channels to be vacated by Nextel, its Total and MHz/Pops Equivalent Spectrum set forth immediately above would be reduced by 7.00 MHz. Nextel therefore would hold 19.0 MHz of Total, Clean or MHz/Pops Equivalent and Cellular Spectrum in this EA market.

4. *Increase in Value of Nextel's Spectrum Holdings (800 MHz and 1.9 GHz Band Spectrum).*

According to the *Report and Order*, the present average fair market value of Nextel's 800 MHz band spectrum to be exchanged as part of the Consensus Parties Proposal's movement methodology is \$1.61 MHz/Pop.⁴⁴ The FCC further determined that the present fair market value of the 800 MHz and 1.9 GHz band spectrum Nextel would receive in exchange therefor would be \$1.70 MHz/Pop.⁴⁵

Applying these figures to the Atlanta, Georgia-Alabama-North Carolina EA market, the present value of the Nextel Control Group's 800 MHz band spectrum to be exchanged under the *Report and Order* would be determined by multiplying Nextel's one hundred eleven (111) Channels, or 5.55 MHz of Clean Spectrum, by the EA market's total population of 5,471,412 (2003 Pops) and then multiplying the resulting figure of 30,366,634 by \$1.61 MHz/Pop. The resulting figure of \$48,889,802 would be the present value of the 800 MHz band spectrum Nextel would exchange in this EA market under the *Report and Order*. However, since under the *Report and Order's* movement methodology, the NCG's EA- and Site-Licensed Spectrum moves on a Total Spectrum 1:1 basis, rather than upon a MHz/Pops Equivalent basis, and the FCC allocates all 10 MHz of 1.9 GHz band spectrum exclusively to Nextel by a private sale, the NCG would receive a total of three hundred twenty (320) Clean 800 MHz (120 Channels in the former NPSPAC Channels) and 1.9 GHz band Channels (200 such Channels), or 16.00 MHz of such Spectrum.

Under the *Report and Order*, the fair market value of this Spectrum would be determined by multiplying 16 MHz of Clean Spectrum by the EA market's total population of 5,471,412, and then multiplying the resulting figure by \$1.70 MHz/Pop. The resulting figure of \$148,822,406 would be the fair market value of the Clean Spectrum the Nextel Control Group would receive under the *Report and Order*. The \$99,932,504 difference in the fair market values of the spectrum to be exchanged under the *Report and Order* is the amount of the NCG's 800 MHz band spectrum enhancement.

5. *Effect of Report and Order Upon Non-Nextel EA and Cellular-Architecture Site Licensees' Spectrum Holdings.*

Southern Communications Services, Inc. ("Southern") holds one hundred twenty-five (125) General Category EA Channels (6.25 MHz) in this EA market. Due to the presence of site-specific incumbents, Southern's Channels cover 63.04% of this EA market's total population. Southern therefore holds seventy-nine (79) MHz/Pops Equivalent Channels. Moreover, Southern also holds thirteen (13) General Category Site Channels within the twenty-five (25) General Category EA authorization held by Nextel in this EA market. These Site Channels cover an average of 28.04% of the EA market's

⁴⁴ See n. 13 *supra*.

⁴⁵ See n. 14 *supra*.

population and therefore are equivalent to four (4) Channels of Clean or MHz/Pops Equivalent Spectrum. Further, Southern holds twenty (20) Lower 80 EA-Licensed Channels. Due to these frequencies covering an average of 23.45% of the population of this EA market, they are equivalent to five (5) Channels of Clean or MHz/Pops Equivalent Spectrum. In addition, Southern holds six (6) Lower 80 Site Channels within the sixty (60) Lower 80 EA Channels held by Nextel in this EA market. Due to these frequencies' covering an average of 12.03% of the total population of this EA market, they are the equivalent of one Channel of Clean or MHz/Pops Equivalent Spectrum. Finally, Southern holds ninety-three (93) BILT and three (3) Upper 200 Channels in this EA market. Since these BILT and Upper 200 Channels respectively cover an average of 28.15% and 2.50% of this EA market's total population, they are the equivalent of twenty-six (26) and one (1) Channel(s) of Clean or MHz/Pops Equivalent Spectrum.

Under paragraph 163 of the *Report and Order*, Southern's EA- and Site-Licensed Spectrum generally would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. As a result, two hundred sixty (260) channels presumably would move to the former NPSPAC and Upper 200 Channels in the new Cellular Block on an EA market wide, Clean 1:1 basis.⁴⁶ The problem, of course, under the *Report and Order* is that Nextel is allocated the former NPSPAC Channels in every EA market regardless of its relative 800 MHz band spectrum holdings in a particular EA market.

Under the approach suggested above, Southern's two hundred sixty (260) Ea- and Site-Licensed Channels would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. One hundred twenty (120) of Southern's Channels would move to the former NPSPAC Channels. Its remaining one hundred forty (140) Channels would move to the Upper 200 Channels to be vacated by Nextel beginning presumably with Channel 404 (Southern's three Upper 200 Channels presumably would be moved to Channels 401-403). Nextel would retain Channels 541-600 and its 900 MHz band spectrum in this EA market.⁴⁷ Moreover, under this approach Nextel would be allocated two hundred (200) Channels of 1.9 GHz band spectrum as replacement for its two hundred five (205) EA- and Site-Licensed 800 MHz band spectrum the FCC would move and modify. Such approach would appear clearly preferable to the Commission's *pro rata* allocation set forth in paragraph 168 and n. 444 thereto in the *Report and Order* since it would allocate 1.9 GHz band spectrum as a replacement of Nextel's already existing 800 MHz band spectrum under the FCC's Section 316 modification authority rather than exclusively allocating such spectrum to Nextel by a private sale in

⁴⁶ However, due to the "insufficient" spectrum in the ESMR portion of the band to replicate the existing channel capacity of both Nextel and Southern in EA markets in Georgia, Alabama, southeastern Mississippi and northern Florida, on its own motion the FCC expanded the ESMR portion of the band in these EA markets by 2.5 MHz to include 813.5-816 MHz/858.5-861 MHz. Having such portion of the band in these EA markets, the FCC then left it up to Nextel and Southern to reach an agreement concerning the apportionment of their respective channels within the expanded ESMR portion of the band. See discussion at pp. 2-3 *supra*.

⁴⁷ See n. 15 *supra*.

contravention of the otherwise mandatory competitive bidding provisions of Section 309(j).⁴⁸

Under the *Report and Order*, the value of this 800 MHz band spectrum vacated by Nextel would be determined by multiplying Nextel's one hundred forty (140) channels (7 MHz) by the EA market's total population of 5,471,412 (2003 Pops) and then multiplying the resulting figure of 38,299,884 by \$1.70 MHz/Pop.⁴⁹ The resulting figure of \$65,109,803 would be the present value of the 800 MHz band spectrum in the Upper 200 Channels Nextel would vacate to facilitate the movement of the EA- and Site-Licensed Spectrum held by the Non-Nextel Licensee in this EA market. Thus, even in this EA market, if Nextel vacates its one hundred forty (140) Channels in the Upper 200 Channels on an EA market Clean 1:1 basis to Southern, it would realize a \$34,822,701 increase or enhancement of its spectrum holdings.

6. *Effect of Report and Order Upon Other 800 MHz Licensees' Spectrum Holdings*

Under the *Report and Order*, the Site Channels held by other Non-Nextel Control Group licensees in the General Category Channels (Channels 1-150) and in the Upper 200 Channels would move to the thirty-three (33) Interleave and eighty (80) Lower 80 Channels to be vacated by the NCG. In this EA market, other Non-Nextel licensees hold forty-six (46) General Category Site Channels. Other Non-Nextel licensees hold fifty-four (54) Site Channels in the Upper 200 Channels.⁵⁰ According to the *Report and Order*, these Site Channels would receive comparable facilities and their present geographic "footprint." A total of one hundred (100) General Category and Upper 200 Site Channels therefore would be moved into sixty-nine (69) Interleave and Lower 80 Channels to be vacated by Nextel on a geographic "footprint" basis. While Nextel's Lower 80 Channels cover an average of 81.59% of the EA market's population, its BILT Channels cover an average of only 45.99% of this EA market's population. If the average "footprint" of the General Category and Upper 200 Site Channels is greater than Nextel's BILT Channels to be vacated, insufficient spectrum would be available to accommodate the movement of the Site Channels held by Non-Nextel licensees in this EA market.⁵¹

⁴⁸ See *Verizon Wireless White Paper*, at pp. 4-11. Under the FCC's *pro rata* distribution approach, Southern would be allocated 33.72% of the 320 Channels in the ESMR portion of the 800 MHz band or 108 Channels since it holds 145 of the 430 total EA Channels in the Atlanta EA market. Southern therefore would lose 152 total Channels. Nextel would be allocated 220 Channels, or 66.28% of the 320 Channels in the ESMR portion of the 800 MHz band. Nextel therefore would lose 185 total Channels. Of course, Nextel exclusively would be allocated 200 Channels in the 1.9 GHz band by a private sale. Nextel's total Channels therefore would increase by 15 Channels.

⁴⁹ See n. 26 *supra*.

⁵⁰ See n. 17 *supra*.

⁵¹ See *id.* If Southern's General Category and Lower 80 EA- and Site-Licensed Channels and BILT Channels move into the new Cellular Block, it would vacate 93 Interleave

7. Effect of Adoption of Preferred's Improvements.

If the FCC determines to adopt Preferred's Improvements set forth in the Overview to this First Request For Clarifications, Channels 1-25 of the General Category EA Authorizations held by Southern would move to Channels 576-600 of the Upper 200 Channels held by Nextel, and available to be vacated, on an EA market wide Clean 1:1 basis. Southern's remaining one hundred (100) General Category EA Channels would move to Channels 601-700 of the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under Preferred's Improvements, Nextel would move twenty (20) of its twenty-five (25) General Category EA Channels to the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under such approach, Nextel's five (5) remaining General Category EA, one hundred eight (108) Upper 200 and sixty (60) Lower 80 EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Its General Category and B/ILT Site Channels would move to the 1.9 GHz band on a MHz/Pops Equivalent basis. Nextel therefore would move such Site Channels to the 1.9 GHz band for forty-one (41) Channels in the 1.9 GHz band on an EA market wide and Clean basis. Nextel therefore would hold two hundred fourteen (214) Channels, or 10.70 MHz, rather than the nationwide "running average" of 4.5 MHz of such 1.9 GHz band spectrum on an EA market wide and Clean basis as replacement spectrum for its vacated 800 MHz band spectrum.

Under Preferred's Improvements, in this EA market the FCC would need to allocate an additional fourteen (14) Channels or .70 MHz of 1.9 GHz band spectrum to Nextel. Due to the unique licensing situation in Southern's core markets (Georgia, Alabama, southeast Mississippi and northern Florida), little or no "excess" 1.9 GHz band spectrum remains after replacing Nextel's or Nextel Partners' vacated 800 MHz band spectrum. In these EA markets, the Commission clearly has the authority to allocate 1.9 GHz band spectrum under Section 316 since it is largely reassigning frequencies for already existing 800 MHz band spectrum.

8. Conclusion.

Under the *Report and Order's* approach, the NCG experiences an increase in its both its Total Spectrum and MHz/Pops Equivalent or Clean Spectrum in this EA market. With Nextel's vacating one hundred eight (108) channels in the Upper 200 Channels in the new Cellular Block, it would hold four hundred twelve (412) Total and Clean 800 MHz and 1.9 GHz band channels (20.6 MHz) as compared to its present four hundred five (405) Total, and two hundred ninety-three (293) Clean, channels it presently

Channels thereby freeing up sufficient spectrum to accommodate the General Category and Upper 200 Site Channels of other licensees.

holds. According to the *Report and Order*, the value of the 800 MHz and 1.9 GHz band spectrum the Nextel Control Group would receive in this EA market would exceed the value of the 800 MHz band spectrum it would vacate by \$32,380,500 (the value of the spectrum Nextel would receive would be determined by multiplying 5,471,412 Pops (2003 figure) by (a) 13.5 MHz of 800 MHz and 1.9 GHz Band spectrum; the resulting figure of 73,864,062 is then multiplied by (b) \$1.70 per MHz/Pop producing a figure of \$125,568,905; the value of the spectrum Nextel would vacate would be determined by multiplying the Pops figure by (c) 3.45 MHz of 800 MHz Band Spectrum (Interleaved Channels) and (d) 7 MHz of 800 MHz Band Spectrum (Upper 200 Channels)⁵²; the resulting figures of (a) 18,876,371 and (b) 38,299,884 are then multiplied respectively by (e) \$1.4875 per MHz/Pop and (f) \$1.70 per MHz/Pop producing a figure of \$93,188,405; the difference between \$125,568,905 and \$93,188,405, or \$32,380,500 would be the amount of Nextel's spectrum enhancement in this EA market.

By contrast, the Non-Nextel EA Licensee in this EA market experiences a decrease in both its MHz/Pops Equivalent Channels and Total Channels. Southern's Clean Spectrum decreases from one hundred nine (109) (5.45 MHz) to one hundred eight (108) (5.40 MHz) Channels. Its Total Channels decrease from two hundred sixty (260) Channels (13 MHz) to one hundred eight (108) Channels.⁵³

Under the *Report and Order's pro rata* allocation approach, Southern would lose one hundred fifty-two (152) Total Channels (7.6 MHz), most of which are BILT Channels currently used by it as an integral part of its system. According to the *Report and Order*, such Spectrum would have a value of \$1.4875 MHz/Pop or \$61,854,313. Arguably, the difference of \$61,854,313 is the amount of Southern's loss in spectrum or spectrum rights that effectively were transferred to the NCG, which received one hundred nineteen (119) additional Channels of Clean Spectrum, or a considerable portion of the one hundred fifty-two (152) such Channels Southern would be denied by the *Report and Order's* impermissible discriminatory movement methodology. Preferred maintains that this uncompensated loss, and spectrum enhancement to the Nextel Control Group, represents a portion of Nextel's promised contribution of to defray the total relocation costs.⁵⁴

⁵² These figures would include the sixty-nine (69) Clean or MHz/Pops Equivalent Interleaved Channels' Spectrum (Lower 80 and BILT Channels) and the one hundred forty (140) EA market wide Clean Upper 200 Channels to be vacated by Nextel.

⁵³ Under the preliminary agreement reached between Southern and Nextel, Southern would hold one hundred eight (108) Channels in an expanded Cellular Block extending to 813.5/858.5 MHz. Pursuant to such Agreement, Southern therefore would lose one hundred fifty-two (152) Total Channels (7.6 MHz) in the Atlanta EA market while Nextel would gain seventy-five (75) Total Channels (3.75 MHz).

⁵⁴ This argument also clearly would apply in any EA market with respect to which the Transition Administrator and the Commission apply the *pro rata* distribution approach set forth in footnote 444 of the *Report and Order* to reduce the total number of channels held by a Non-Nextel EA or Cellular-Architecture System licensee while increasing both

Preferred would maintain that the Report and Order's *pro rata* allocation approach as set forth in paragraph 168 and note 444 violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution⁵⁵ and the FCC's statutory mandate to maintain regulatory parity and promote competition.⁵⁶

Moreover, it would appear that the proposed agreement set forth between Southern and Nextel described in paragraph 168 of the *Report and Order* is mathematically unworkable due to the number of Non-Nextel and Non-Southern SMR and B/ILT Site licenses in Channels 1-150 and 401-600.⁵⁷ As noted above, the proposed agreement would expand the ESMR portion of the band in Southern's core markets (Georgia, Alabama, Southeast Mississippi and Northern Florida) by one hundred (100) paired channels or 2.5 MHz from Channel 401 or 816.0125/861.0125 MHz downward to Channel 301 or 813.5125/858.5125 MHz. Pursuant to such proposed agreement, Southern would be allocated these one hundred (100) paired channels and the forty (40) paired channels beginning with Channel 401 within the Upper 200 Channels.

As noted above, Nextel holds only sixty (60) Lower 80 EA Channels and nine (9) B/ILT Channels in this EA market. Non-Nextel and Non-Southern SMR and B/ILT Site licensees hold one hundred (100) channels in Channels 1-150 and 401-600 that need to be moved into the Lower 80 EA and B/ILT Site Channels Nextel would vacate. Given the relatively small contours and population coverage of Nextel's B/ILT Channels in this EA market, it appears unlikely that their geographic "footprint" would accommodate the "footprint" of the Non-Nextel and Non-Southern Site licenses to be relocated. Thus, Nextel likely holds only sixty (60) usable channels to which these one hundred (100) Non-Nextel and Non-Southern Channels would be moved. The approximately forty (40) excess Channels presumably would be moved to Southern's B/ILT Channels thus

the Total Spectrum and Clean or MHz/Pops Equivalent Spectrum held by the Nextel Control Group in that market.

⁵⁵ See Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, p. 11 & n. 46; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, pp.41-43 & n. 97; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, p. 5.

⁵⁶ See Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, pp. 12 & n. 48; pp. 13-16; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, p. 41 & n. 94; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, p. 5-6 & nn. 16-17.

⁵⁷ Southern recently recognized this problem in the Atlanta EA market and filed a request for clarification to eliminate the proposed Expansion Band due to lack of spectrum resulting from the movement of Non-Nextel and Non-Southern Site Channels in Channels 1-150 to the Interleave Channels. If the Commission were to move the fifty (50) Non-Nextel and Non-Southern Site Channels in the Upper 200 Channels to the Interleave Channels to accommodate the relocation of Southern's channels, this problem would be further exacerbated. See generally Southern Communications Services, Inc., Ex Parte Presentation, October 8, 2004.

necessitating moving Southern's Channels from Channels 301-400 to the Upper 200 Channels. Southern therefore would move its Channels upward from Channel 440 to Channel 480 or 816.9875/861.9875 MHz to 817.9875/862.9875 MHz. If Public Safety licensees were to retain their fifteen (15) Channels within Channels 301-400 in this EA market, fifteen (15) additional Southern Channels would be required to be shifted into the Upper 200 Channels moving its Channels upward from Channel 440 to Channel 495 or 816.9875/861.9875 MHz to 818.3875/863.3875 MHz. Nextel would retain the remaining 105 Channels in the Upper 200 Channels or 5.25 MHz.

As discussed above, the problem with shifting Southern's EA- and Site-Licensed Spectrum upward to accommodate this excess Non-Nextel and Non-Southern Site-Licensed Spectrum is that Nextel apparently is unwilling to surrender more than seventy (70) of its Total Channels in the Upper 200 Channels.

NEXTEL AFTER REBANDING					SOUTHERN
	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S	CELLULAR ELIGIBLE FREQ'S
UPPER 200	92	100%	4.6	92	108
6 MHz SMR (NSPAC)	120	100%	6.0	120	0
10 MHz (1.9 GHz)	200	100%	10.0	200	0
TOTAL	412	100%	20.6	412	108

NEXTEL BEFORE AND AFTER PICTURE		
	BEFORE	AFTER
TOTAL CHANNELS	405	412
MHz/POPS EQUIVALENT	14.65	20.6
EA-WIDE FREQ'S (MHZ)	16.5	20.6

SOUTHERN BEFORE AND AFTER PICTURE		
	BEFORE	AFTER
TOTAL CHANNELS	260	140
MHz/POPS EQUIVALENT	6.1	7.0
CELLULAR SPECTRUM (MHZ)	12.30	7.0

NEXTEL AFTER REBANDING—IMPROVEMENTS					OTHERS
	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S	CELLULAR ELIGIBLE FREQ'S
UPPER 200	89	100%	4.45	92	111

6 MHz SMR (NSPAC)	0	100%	0.0	0	120
10 MHz (1.9 GHz)	214	100%	10.7	208	0
TOTAL	303	100%	15.15	303	231

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	405	303
MHZ/POPS EQUIVALENT	14.65	15.15
EA-WIDE FREQ'S (MHZ)	16.5	15.15

SOUTHERN BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	260	231
MHZ/POPS EQUIVALENT	6.1	11.55
CELLULAR SPECTRUM (MHZ)	12.30	11.55

d. Spectrum Holdings in the Puerto Rico EA Market.

As set forth in the Chart immediately below, Nextel holds twenty-five (25) General Category EA-Licensed frequencies covering an average of 73.59% of the EA market's total population, or the equivalent of eighteen (18) Channels of Clean Spectrum. Likewise, due to its eighty (80) Lower 80 EA frequencies covering an average of 75.85% of the EA market's total population, Nextel would hold the equivalent of sixty-one (61) Channels of Clean Spectrum. Nextel does not hold any Business or Industrial/Land Transportation Category Channels in this EA market.

MARKET BEA174 PUERTO RICO EA MARKET NEXTEL CHANNELS SUMMARY

	TOTAL FREQ'S	% OF POPS	MHZ/POPS EQUIVALENT	EA-WIDE FREQ'S	CELLULAR ELIGIBLE FREQ'S
SMR GC EA	25	73.59%	18	25	125
SMR GC SITE	0	0.00%	0		19
SMR L80 EA	80	75.85%	61	80	
SMR L80 SITE	0	0.00%	0		10
B/ILT	0	0.00%	0		
PS	0	0.00%	0		

SUBTOTALS (Freq's)	105		79	105	154
SUBTOTALS (MHz)	5.25		3.95	5.25	7.7

SMR U200 EA	60	23.61%	14	60	120
SMR U200 SITE	54	23.37%	12.6		16
SUBTOTALS (Freq's)	113		26.6		146
SUBTOTALS (MHz)	5.65		1.33	3.00	7.3

TOTALS (Freq's)	219		117	165	300
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TOTALS (MHz)	10.9		5.28	8.25	15
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	CHANNELS	MHz
NEXTEL Published		

1. *Report and Order's Movement Methodology: (a) move the Nextel Control Group's General Category EA- and Site-Licensed Spectrum to the new Cellular Block on an EA market wide Clean 1:1 basis; (b) credit Nextel with a nationwide "running average" of the General Category, Interleave and Lower 80 Channels vacated by it, Nextel Partners and licensees which have executed a management or purchase option agreement with it and modify such spectrum by reassigning to Nextel 4.5 MHz of 1.9 GHz band spectrum; (c) move the Non-NCG's EA and Cellular-architecture Systems Site Licensees' EA-Licensed Spectrum to the new Cellular Block on an EA market wide, Clean 1:1 basis; however such Licensees' Site-Licensed Spectrum would move to the new Cellular Block on such basis only if (1) it is located in an EA market in which such Licensee holds an EA Authorization and (2) the Non-Nextel Control Group EA or Cellular-architecture System Site Licensee is using such Site-Licensed Spectrum as part of a Cellular-architecture System as of the date of the publication of the Report and Order in the Federal Register.*

Due to the presence of site-specific incumbents, the NCG holds seventy-nine (79) MHz/Pops Equivalent Lower 230 Channels. Upon their movement under the *Report and Order*, the Nextel Control Group would be allocated one hundred five (105) Channels on a Clean basis, a net gain of twenty-six (26) MHz/Pops Equivalent Channels. As noted in Preferred's Ex Parte Presentation filed on March 2, 2004, this result appears to belie the oft-repeated argument by the Consensus Parties that their Proposal involves only a "kHz-for-kHz exchange" or "replacement spectrum."⁵⁸ As noted above, under the *Report and Order*, this result will hold true in a majority of the 175 EA markets.⁵⁹

⁵⁸ See n. 4 *supra*. Interestingly enough, Nextel did not include a Total Spectrum for any city in Puerto Rico, including San Juan, even though it, Ponce, Mayaguez, Arecibo and

Since the *Report and Order* moves spectrum on a Total, rather than upon a MHz/Pops Equivalent basis, it moves the NCG's twenty-five (25) General Category EA Channels to the former NPSPAC Channels. Its eighty (80) Lower 80 EA-Licensed Channels would be reassigned an identical number of frequencies in the 1.9 GHz band.

2. *Allocation of 1.9 GHz Band Spectrum Exclusively to Nextel.*

Under the *Report and Order*, therefore, Nextel would be allocated eighty Channels (4 MHz) of 1.9 GHz band spectrum solely as the result of its 800 MHz band movement methodology. Pursuant to the *Report and Order*, the FCC would sell 6 MHz of the 10 MHz of the 1.9 GHz band spectrum in this EA market to Nextel in exchange for (a) Nextel's 700 MHz Guard Band holdings unrelated to any reorganization of the 800 MHz band; (b) secured promise to pay the total 800 MHz band relocation costs; and (c) promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band apparently was believed necessary by the Commission to avoid (1) connecting the award of 1.9 GHz band to the movement and modification of the 800 MHz EA- and Site-Licensed Spectrum of General Category and Lower 80 EA licensees (2) triggering the otherwise mandatory competitive bidding provisions of Section 309(j) by providing a basis for the FCC's limiting the participation in the allocation of the 1.9 GHz band spectrum to only Nextel.

Pursuant to its Section 316 modification authority, in this EA market the FCC would allocate 4 MHz of 1.9 GHz band spectrum to Nextel to replace that company's already-existing 800 MHz band spectrum. The award of such 1.9 GHz band spectrum in this EA therefore clearly would not involve the issuance of an "initial" license by the Commission implicating the competitive bidding provisions of Section 309(j).⁶⁰ Under Sections 316, 301, 303 and 309(j)(6)(E), the Commission maintains in the *Report and Order* that it has the discretion to determine that it better serves the public interest to allow Nextel to purchase 6 MHz of the 1.9 GHz band spectrum free from the filing of competing license applications.⁶¹ While this position appears meritorious if the FCC were allocating this remaining 1.9 GHz band spectrum to the class of licensees whose spectrum holdings were being modified and moved—General Category and Lower 80 EA licensees, it clearly violates the Commission's statutory mandates under the to maintain regulatory parity and promote competition⁶² and the competitive bidding

Aguadilla are Metropolitan Service Areas ("MSA") markets ranked 91, 147, 169, 202 and 204 by population (1990 Pops). As Preferred noted in its March 2, 2004 Ex Parte Presentation, including such cities in Nextel's Top 320 Markets reduces the Nextel Control Group's nationwide "running" average of 800 MHz band spectrum to 17.57 MHz. See **Exhibit E** to Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004.

⁵⁹ See n. 15 *supra*.

⁶⁰ See n. 7 *supra*.

⁶¹ See n. 8 *supra*.

⁶² See n. 9 *supra*.

provisions of Section 309(j)⁶³ by restricting participation in such allocation to a single entity within such class of licensees.⁶⁴

3. *Effect of Report and Order Upon Nextel's Total and Clean Spectrum.*

In the Puerto Rico EA market, Nextel considerably increases its Total Spectrum from 10.95 MHz to 16.95 MHz, its MHz/Pops Equivalent Spectrum from 5.28 MHz to 14.88 MHz, and its EA Wide Spectrum from 8.25 MHz to 14.25 MHz.⁶⁵ These spectrum increases occur because the *Report and Order's* (a) 800 MHz band movement methodology discussed immediately above and (b) the exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum.

4. *Increase in Value of Nextel's Spectrum Holdings (800 MHz and 1.9 GHz Band Spectrum).*

According to the *Report and Order*, the present average fair market value of Nextel's 800 MHz band spectrum to be exchanged as part of the Consensus Parties' movement methodology is \$1.61 MHz/Pop.⁶⁶ Following adoption by the Commission of the Consensus Parties' Proposal, the fair market value of the 800 MHz and 1.9 GHz band spectrum Nextel would receive in exchange therefor would be \$1.70 MHz/Pop.⁶⁷

Applying these figures to the Puerto Rico EA market, the present value of the Nextel Control Group's 800 MHz band spectrum to be exchanged under the *Report and Order* would be determined by multiplying Nextel's seventy-nine (79) Channels, or 3.95 MHz of Clean Spectrum, by the EA market's total population of 4,000,000 (2003 Pops) and then multiplying the resulting figure of 13,400,000 by \$1.61 MHz/Pop. The resulting figure of \$25,438,000 would be the present value of the 800 MHz band spectrum Nextel would exchange in this EA market under the *Report and Order*. However, since under the *Report and Order's* movement methodology, the NCG's EA- and Site-Licensed Spectrum moves on a Total Spectrum 1:1 basis, rather than upon a MHz/Pops Equivalent basis, and the FCC allocates all 10 MHz of 1.9 GHz band spectrum exclusively to Nextel by a private sale, the NCG would receive a total of two hundred and twenty-five (225) Clean 800 MHz (25 Channels in the former NPSPAC Channels) and 1.9 GHz band Channels (200 such Channels), or 11.25 MHz of such Spectrum.

⁶³ See n. 10 *supra*.

⁶⁴ See n. 11 *supra*.

⁶⁵ With the movement of Preferred's EA- and Site-Licensed Spectrum into the sixteen (16) Upper 200 Channels to be vacated by Nextel, its Total and MHz/Pops Equivalent Spectrum set forth immediately above would be reduced by .80 MHz.

⁶⁶ See n. 13 *supra*.

⁶⁷ See n. 14 *supra*.

Under the *Report and Order*, the fair market value of this Spectrum would be determined by multiplying 11.25 MHz of Clean Spectrum by the EA market's total population of 4,000,000, and then multiplying the resulting figure by \$1.70 MHz/Pop. The resulting figure of \$76,500,000 would be the fair market value of the Clean Spectrum the Nextel Control Group would receive under the Consensus Parties' Proposal. The \$51,062,000 difference in the fair market values of the spectrum to be exchanged under the *Report and Order* Proposal is the amount of the NCG's 800 MHz band spectrum enhancement.

5. *Effect of Report and Order Upon Non-Nextel EA and Cellular-Architecture Site Licensees' Spectrum Holdings.*

Preferred holds one hundred twenty-five (125) General Category EA Channels (6.25 MHz) in this EA market. Due to the presence of site-specific incumbents, Preferred's Channels cover 90.00% of this EA market's total population. Preferred therefore holds one hundred thirteen (113) MHz/Pops Equivalent Channels. Moreover, Preferred also holds nineteen (19) General Category Site Channels within the twenty-five (25) General Category EA authorization held by Nextel in this EA market. These Site Channels cover an average of 24.94% of the EA market's population and therefore are equivalent to five (5) Channels of Clean or MHz/Pops Equivalent Spectrum.

Further, in January 2003, Preferred executed a Stock Purchase Agreement with the sole shareholder of North Sight Communications, Inc. and Trunked Systems, PR, Inc. ("North Sight Companies"). The Commission already has approved the EA and Site license transfer applications filed by the parties. The North Sight Companies hold ten (10) Lower 80 Site Channels within the EA Authorizations held by Nextel. Due to these frequencies covering an average of 55.08% of the population of this EA market, they are equivalent to six (6) Channels of Clean or MHz/Pops Equivalent Spectrum. In addition, the North Sight Companies hold sixteen (16) Upper 200 Site Channels within EA Authorizations held by High Tech Communications Services, Inc. and Nextel. Due to these frequencies covering an average of 46.70% of the population of this EA market, they are equivalent to seven (7) Channels of Clean or MHz/Pops Equivalent Spectrum. Finally, the North Sight Companies hold the C Frequency Block EA Authorization in this market, which comprises one hundred twenty (120) Channels. The North Sight Companies will deploy a Harmony system satisfying the cellular-architecture system requirement by January 1, 2005.

Under paragraph 163 of the *Report and Order*, Preferred's EA- Licensed Spectrum would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. However, since Nextel holds only sixteen (16) Upper 200 EA Clean Channels throughout Puerto Rico, it is unclear where the FCC would move one hundred nine (109) of Preferred's General Category EA Channels. Alternatives include the following:

- (4) Move 16 of such Channels to Nextel's Upper 200 EA Clean Channels;
- (5) Then move 95 of such Channels to the Former NPSPAC Channels (with

- Nextel's 25 General Category EA Channels); and
- Then move 14 of such Channels to the 1.9 GHz Band as replacement spectrum.

The problem, of course, under the *Report and Order* is that Nextel apparently is allocated the former NPSPAC Channels in every EA market regardless of its relative 800 MHz band spectrum holdings in a particular EA market.

Under the *Report and Order*, it is unclear where Preferred's General Category Site Channels would move. Since Preferred holds EA Authorizations in this EA market, it satisfies the first prong of the EA Licensees' Site Channels Cellular Deployment Test. However, since it has not yet constructed a cellular-architecture system in this EA market, paragraph 163 of the *Report and Order* indicates that such Site Channels would move to the Guard Band (816-817 MHz/861-862 MHz) on an EA market wide, Clean 1:1 basis.⁶⁸ Unfortunately, these Channels are held by High Tech Communications Services, Inc. (holder of A Frequency Block EA Authorization) and several Site license incumbents. As noted below, the Expansion Band Channels (815-816 MHz/860-861 MHz) also are fully occupied. Another alternative would be for the Commission to move these nineteen (19) General Category Site Channels to the Upper 200 EA Channels held by Nextel (B Frequency Block: Channels 421-480). However, as noted above, Nextel holds only sixteen (16) Upper 200 EA Channels of Clean Spectrum throughout the island. It therefore is unclear where the FCC would move the remaining three (3) General Category Site Channels. Finally, the Commission could move these three to nineteen (3-19) General Category Site Channels to the 1.9 GHz Band as replacement spectrum.

Since Nextel is afforded the benefit of "constructive" ownership of the licenses held by Nextel Partners, Inc. and licensees which have executed a management or purchase option agreement with Nextel, Preferred would maintain that it should be considered to own constructively the licenses presently held by the North Sight Companies. Since, as noted above, these Companies satisfy both prongs of the EA Licensees' Site Channels Cellular Deployment Test, its ten (10) Lower 80 and twenty-two (22) Site Channels generally would move into the new Cellular Block on an EA market wide, Clean 1:1 basis.

⁶⁸ It is also unclear where Nextel's Upper 200 Site Channels within the EA Authorizations held by High Tech Communications Services, Inc. and North Sight Communications, Inc. would move. If the *Report and Order's* treatment of Site-Licensed Spectrum also applies to the Nextel Control Group, Nextel's Site Channels would be required to move to the Non-Cellular Block since they will not been constructed as part of a Cellular-architecture System by the date of the publication of the *Report and Order* in the Federal Register. However, if such treatment applies only to Non-Nextel Control Group EA licensees, it necessarily would violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the FCC's statutory mandate to maintain regulatory parity and promote competition. See Southern Communications Services, Ex Parte Presentation, June 23, 2004, p.11 & n. 46 citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)(holding that the Fifth Amendment's Due Process Clause prohibits arbitrary discrimination by the federal government).

However, given the 800 MHz spectrum holdings in this EA market, it is unclear where these Channels would move. Alternatives include the following:

- (6) Guard Band (816-817 MHz/861-862 MHz); or
- (7) Expansion Band (815-816 MHz/860-861 MHz); or
- (8) Nextel's Upper 200 EA Clean Channels in the B Frequency Block (Channels 421-480); or
- (9) 1.9 GHz Band.

Under this approach Nextel would be allocated eighty (80) Channels of 1.9 GHz band spectrum as replacement for its eighty (80) EA- and Site-Licensed 800 MHz band spectrum the FCC would move and modify. Such approach would appear preferable to the Commission's *pro rata* allocation set forth in paragraph 168 and n. 444 thereto in the *Report and Order* since it would allocate 1.9 GHz band spectrum as a replacement of Nextel's already existing 800 MHz band spectrum under the FCC's Section 316 modification authority rather than exclusively allocating such spectrum to Nextel by a private sale in contravention of the otherwise mandatory competitive bidding provisions of Section 309(j).⁶⁹

Under the Report and Order, the value of this 800 MHz band spectrum vacated by Nextel would be determined by multiplying Nextel's sixteen (16) channels (.8

⁶⁹ See Verizon Wireless, Ex Parte Presentation, April 6, 2004, pp. 4-11. Under the FCC's *pro rata* distribution approach, it is unclear what percentage of the 320 Channels in the ESMR portion of the 800 MHz band Preferred would be allocated. Preferred holds one hundred twenty-five (125) General Category EA Channels. North Sight Communications, Inc., a separate company which executed a Stock Purchase Agreement with Preferred in January 2003, holds one hundred twenty (120) Upper 200 EA Channels. High Tech Communications Services, Inc., an independent company, holds twenty (20) Upper 200 EA Channels. Nextel holds twenty-five (25) General Category EA Channels, eighty (80) Lower 80 EA and sixty (60) Upper 200 Channels. Here the total number of EA Channels would be four hundred thirty (430), rather than the three hundred twenty (320) figure used by the FCC in footnote 444. Under this approach, Preferred and North Sight Communications, Inc. would hold two hundred forty-five (245) Channels or 56.98%. High Tech Communications Services, Inc. would hold twenty (20) Channels or 4.65%. Nextel would hold one hundred sixty-five (165) Channels or 38.37%. Preferred and North Sight Communications, Inc. therefore would be allocated one hundred eighty-two (182) Channels or 9.1 MHz of spectrum. High Tech Communications, Inc. would be allocated fifteen (15) Channels or .75 MHz of spectrum. Nextel would be allocated one hundred twenty-three (123) Channels or 6.15 MHz of spectrum. Of course, under the *Report and Order*, only Nextel would be allowed to purchase 10 MHz of 1.9 GHz band spectrum. Nextel therefore would hold 16.15 MHz of Total, Clean and Cellular Spectrum, a considerable increase over its present 800 MHz band spectrum holdings in this EA market. By contrast, Preferred and North Sight Communications, Inc. would experience a decrease in their Total, Clean and MHz/Pop Equivalent Spectrum.

MHz) by the EA market's total population of 4,000,000 (2003 Pops) and then multiplying the resulting figure of 3,200,000 by \$1.70 MHz/Pop.⁷⁰ The resulting figure of \$5,440,000 would be the present value of the 800 MHz band spectrum in the Upper 200 Channels. Nextel would vacate to facilitate the movement of the EA- and Site-Licensed Spectrum held by the Non-Nextel Licensees in this EA market. Thus, even if Nextel vacates its sixteen (16) Channels in the Upper 200 Channels on an EA market Clean 1:1 basis to Preferred (and North Sight), it would realize an \$45,622,000 increase or enhancement of its spectrum holdings in this EA market.

6. *Effect of Report and Order Upon Other 800 MHz Licensees' Spectrum Holdings*

Under the *Report and Order*, the Site Channels held by other Non-Nextel Control Group licensees in the General Category Channels (Channels 1-150) and in the Upper 200 Channels would move to the eighty (80) Lower 80 Channels to be vacated by the NCG. In this EA market, other Non-Nextel licensees hold forty-one (41) General Category Site Channels. Other Non-Nextel licensees hold two hundred twenty-one (221) Site Channels in the Upper 200 Channels.⁷¹ According to the *Report and Order*, these Site Channels would receive comparable facilities and their present geographic "footprint." A total of two hundred sixty-two (262) General Category and Upper 200 Site Channels therefore would be moved into eighty (80) Lower 80 Channels to be vacated by Nextel on a geographic "footprint" basis. Nextel's Lower 80 Channels cover an average of 75.85% of the EA market's population. If the average "footprint" of the General Category and Upper 200 Site Channels is comparable to or greater than Nextel's Lower 80 Channels to be vacated, insufficient spectrum would be available to accommodate the movement of the Site Channels held by Non-Nextel licensees in this EA market.⁷²

7. *Effect of Adoption of Preferred's Improvements.*

If the FCC determines to adopt Preferred's Improvements set forth in the Overview to this accompanying comment, Channels 1-25 of the General Category EA Authorizations held by Preferred would move to Channels 576-600 of the Upper 200 Channels held by Nextel, and available to be vacated, on an EA market wide Clean 1:1 basis. However, in this EA market Nextel does not hold such Upper 200 Channels. Preferred therefore would elect to move its twenty-five (25) General Category EA Channels to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Preferred's remaining one hundred (100) General Category EA Channels would move to Channels 601-700 of the former NPSPAC Channels on an EA market wide Clean 1:1 basis. North

⁷⁰ See n. 16 *supra*.

⁷¹ See n. 17 *supra*.

⁷² See *id.* If Southern's General Category and Lower 80 EA- and Site-Licensed Channels and BILT Channels move into the new Cellular Block, it would vacate 93 Interleave Channels thereby freeing up sufficient spectrum to accommodate the General Category and Upper 200 Site Channels of other licensees.

Sight's ten (10) Lower 80 Site Channels would move to the 1.9 GHz band on a Clean 1:1 basis

Under Preferred's Improvements, Nextel would move twenty (20) of its twenty-five (25) General Category EA Channels to the former NPSPAC Channels on an EA market wide Clean 1:1 basis.

Under such approach, Nextel's five (5) remaining General Category EA and eighty (80) Lower 80 EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Nextel does not hold any General Category Site Channels or BILT Channels in this EA market. Nextel therefore would hold eighty-five (85) Channels, or 4.25 MHz, rather than the nationwide "running average" of 4.5 MHz of such 1.9 GHz band spectrum on an EA market wide and Clean basis as replacement spectrum for its vacated 800 MHz band spectrum.

Under Preferred's Improvements, in this EA market the FCC would award the remaining eighty (80) Channels or 4.0 MHz of 1.9 GHz band spectrum by a private sale or other means. However, unlike under the *Report and Order*, Preferred's Improvements would expand the eligibility to participate in the allocation of such 1.9 GHz band spectrum to the entire class of General Category and Lower 80 EA licensees whose EA- and Site-Licensed Spectrum was moved and modified in this proceeding. Licensees within such class who would forego reimbursement of their own relocation costs, such as Nextel Partners apparently is willing to do, would be entitled to receive an allocation of 1.9 GHz band spectrum on an EA market wide and Clean basis. Preferred already has indicated in several previous filings that it would be willing to forego reimbursement of its relocation costs in exchange for an allocation of 1.9 GHz band spectrum in the EA markets in which it holds EA Authorizations. Preferred would seek an allocation of the eighty (80) Channels or 4.0 MHz of 1.9 GHz band spectrum in this EA market. Such award of 1.9 GHz band spectrum would not violate the otherwise mandatorily competitive bidding provisions of Section 309(j) since the Commission has the authority under Section 309(j)(6)(E) to avoid mutual exclusivity and would not violate the FCC's statutory mandates to maintain regulatory parity and promote competition.

8. Conclusion.

Under the *Report and Order's* approach, the NCG experiences an increase in its both its Total Spectrum and MHz/Pops Equivalent or Clean Spectrum in this EA market. With Nextel's vacating nineteen (16) channels in the Upper 200 Channels in the new Cellular Block, it would hold three hundred twenty-three (323) (16.15 MHz) total and two hundred ninety-seven (297) MHz/Pops Equivalent 800 MHz and 1.9 GHz band channels (14.88 MHz) as compared to its present two hundred nineteen (219) Total and one hundred five (105) MHz/Pops Equivalent Channels. According to the *Report and Order*, the value of the 800 MHz and 1.9 GHz band spectrum the Nextel Control Group would receive in this EA market would exceed the value of the 800 MHz band spectrum it would vacate by \$85,945,000 (the value of the spectrum Nextel would receive would

be determined by multiplying 4,000,000 Pops (2003 figure) by (a) 16.15 MHz of 800 MHz and 1.9 GHz Band Spectrum; the resulting figure of 64,600,000 is then multiplied by (b) \$1.70 per MHz/Pop producing a figure of \$109,820,000; the value of the spectrum Nextel would vacate would be determined by multiplying the Pops figure by (a) 3.05 MHz of 800 MHz Band Spectrum (Interleave Channels) and (b) .8 MHz of 800 MHz Band Spectrum (Upper 200 Channels)⁷³; the resulting figures of (a) 12,200,000 and (b) 3,200,000 are then multiplied respectively by (a) \$1.4875 per MHz/Pop and (b) \$1.70 per MHz/Pop producing a figure of \$23,875,000; the difference between \$109,820,000 and \$23,875,000, or \$85,945,000 would be the amount of Nextel's spectrum enhancement in this EA market.

Absent an allocation of 1.9 GHz band spectrum, the Non-Nextel EA Licensee in this EA market experiences a decrease in Total Channels from three hundred (300) to two hundred forty-seven (247). Preferred's MHz/Pops Equivalent Spectrum decreases from one hundred ninety-six (196) Channels (9.88 MHz) to one hundred eighty-four (184) Channels (9.22 MHz).

Under the *Report and Order's pro rata* allocation approach, Preferred would lose one hundred eighteen (118) Total Channels (5.90 MHz). According to the Report and Order, such Spectrum would have a value of \$1.70 MHz/Pop or \$40,120,000. Arguably, the difference of \$40,120,000 is the amount of Preferred's loss in spectrum or spectrum rights that effectively were transferred to the NCG, which received one hundred thirty (130) additional Channels of MHz/Pops Equivalent Spectrum, slightly more than the one hundred eighteen (118) such Channels Preferred would be denied by the *Report and Order's* impermissible discriminatory movement methodology. Preferred maintains that this uncompensated loss, and spectrum enhancement to the Nextel Control Group, represents a portion of Nextel's promised contribution of to defray the total relocation costs.

Preferred would maintain that the *Report and Order's pro rata* allocation approach as set forth in paragraph 168 and note 444 violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution⁷⁴ and the FCC's statutory mandate to maintain regulatory parity and promote competition.⁷⁵

⁷³ These figures would include the sixty-one (61) Clean Interleave Channels (Lower 80 and BILT) and sixteen (16) Clean Upper 200 Channels to be vacated by Nextel.

⁷⁴ See n. 10 *supra*.

⁷⁵ See n. 11 *supra*.

**NEXTEL AFTER
REBANDING**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200 EA	60	23.61%	.70	60
6 MHz SMR (NPSPAC)	25	100%	1.25	25
10 MHz (1.9 GHz)	200	100%	10.0	200
UPPER 200 SITE	38	23.61%	.44	0
TOTAL	323		12.39	285

PCSI

CELLULAR ELIGIBLE FREQ'S
136
95
0
16
247

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	219	323
MHz/POPS EQUIVALENT	5.85	12.39
EA-WIDE FREQ'S (MHZ)	8.25	14.25

PREFERRED BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	300	247
MHz/POPS EQUIVALENT	9.81	9.22
CELLULAR SPECTRUM (MHZ)	15	12.35

**NEXTEL AFTER
REBANDING—
IMPROVEMENTS**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200 EA	60	100%	3.00	60
6 MHz SMR (NSPAC)	20	100%	1	20
10 MHz (1.9 GHz)	85	100%	4.25	85
UPPER 200 SITE	54	23.61	.63	0
TOTAL		100.0%	8.88	165

PCSI

CELLULAR ELIGIBLE FREQ'S
120
100
95
16
331

NEXTEL BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	219	219
MHz/POPS EQUIVALENT	5.85	8.88

EA-WIDE FREQ'S (MHZ)	8.25	8.25
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PREFERRED BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	300	331
MHZ/POPS EQUIVALENT	10.4	268.47
CELLULAR SPECTRUM (MHZ)	15	16.55

e. Spectrum Holdings in the Staunton, Virginia-West Virginia EA Market.

As set forth in the Chart immediately below, Nextel holds twenty-five (25) General Category EA-Licensed frequencies covering an average of 73.59% of the EA market's total population, or the equivalent of eighteen (18) Channels of Clean Spectrum. Likewise, due to its eighty (80) Lower 80 EA frequencies covering an average of 75.85% of the EA market's total population, Nextel would hold the equivalent of sixty-one (61) Channels of Clean Spectrum. Nextel does not hold any Business Category Channels in this EA market.

MARKET BEA016 STAUNTON, VA-WV EA MARKET

NEXTEL PARTNERS CHANNELS SUMMARY

	TOTAL FREQ'S	% OF POPS	MHZ/POPS EQUIVALENT	EA-WIDE FREQ'S
SMR GC EA	0	0.00%	0	0
SMR GC SITE	143	32.00%	46	
SMR L80 EA	70	99.73%	70	70
SMR L80 SITE	9	22.73%	2	
B/ILT	35	35.53%	12	
PS	0	0.00%	0	
SUBTOTALS (Freq's)	257		130	70
SUBTOTALS (MHz)	12.85		6.50	3.50

ARC/PCSI

CELLULAR ELIGIBLE FREQ'S
150
10
160
8.00

SMR U200 EA	200	99.03%	198	200
SMR U200 SITE	0	0.00%	0	
SUBTOTALS (Freq's)	200		198	200
SUBTOTALS (MHz)	10.00		9.90	10.00

0
0
0.00

TOTALS (Freq's)	457		328	270
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160

TOTALS (MHz)	22.85		16.40	13.50
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8.00

	CHANNELS	MHz
NEXTEL Published	N/A	N/A

1. *Report and Order's Movement Methodology: (a) move the Nextel Control Group's General Category EA- and Site-Licensed Spectrum to the new Cellular Block on an EA market wide Clean 1:1 basis; (b) credit Nextel with a nationwide "running average" of the General Category, Interleave and Lower 80 Channels vacated by it, Nextel Partners and licensees which have executed a management or purchase option agreement with it and modify such spectrum by reassigning to Nextel 4.5 MHz of 1.9 GHz band spectrum; (c) move the Non-NCG's EA and Cellular-architecture Systems Site Licensees' EA-Licensed Spectrum to the new Cellular Block on an EA market wide, Clean 1:1 basis; however such Licensees' Site-Licensed Spectrum would move to the new Cellular Block on such basis only if (1) it is located in an EA market in which such Licensee holds an EA Authorization and (2) the Non-Nextel Control Group EA or Cellular-architecture System Site Licensee is using such Site-Licensed Spectrum as part of a Cellular-architecture System as of the date of the publication of the Report and Order in the Federal Register.*

Due to the presence of site-specific incumbents, the NCG holds one hundred thirty (130) MHz/Pops Equivalent Lower 230 Channels. Upon their movement under the *Report and Order*, the Nextel Control Group would be allocated two hundred fifty-seven (257) Channels on a Clean basis, a net gain of one hundred twenty-seven (127) MHz/Pops Equivalent Channels. As noted in Preferred's Ex Parte Presentation filed on March 2, 2004, this result appears to belie the oft-repeated argument by the Consensus Parties that their Proposal involves only a "kHz-for-kHz exchange" or "replacement spectrum."⁷⁶ As noted above, under the *Report and Order*, this result will hold true in a majority of the 175 EA markets.⁷⁷

Since the *Report and Order* moves spectrum on a Total, rather than upon a MHz/Pops Equivalent basis, it moves one hundred twenty (120) of Nextel Partners' one hundred forty-three (143) General Category Site Channels to the former NPSPAC Channels. Its remaining twenty-three (23) General Category Site Channels, seventy (70) Lower 80 EA-Licensed Channels, nine (9) Lower 80 Site Channels and thirty-five (35) BILT Channels would be reassigned an identical number of frequencies in the 1.9 GHz band.

⁷⁶ See n. 4 *supra*. Interestingly enough, in this EA market, Preferred's MHz/Pops Equivalent Spectrum figure of 16.40 MHz approximates equals Nextel's published Total Spectrum figure of 18.10 MHz for the city of Charlottesville, Virginia.

⁷⁷ See n. 5 *supra*.

2. *Allocation of 1.9 GHz Band Spectrum Exclusively to Nextel.*

Under the *Report and Order*, therefore, Nextel would be allocated one hundred forty-seven (147) Channels (7.35 MHz) of 1.9 GHz band spectrum solely as the result of its 800 MHz band movement methodology. Pursuant to the *Report and Order*, the FCC would sell 6 MHz of the 10 MHz of the 1.9 GHz band spectrum in this EA market to Nextel in exchange for (1) Nextel's 700 MHz Guard Band holdings unrelated to any reorganization of the 800 MHz band; (2) secured promise to pay the total 800 MHz band relocation costs; and (3) promise to pay its pro rate share of UTAM and all of the BAS licensee relocation costs in the 1.9 GHz band apparently was believed necessary by the Commission to avoid (1) connecting the award of 1.9 GHz band to the movement and modification of the 800 MHz EA- and Site-Licensed Spectrum of General Category and Lower 80 EA licensees (2) triggering the otherwise mandatory competitive bidding provisions of Section 309(j) by providing a basis for the FCC's limiting the participation in the allocation of the 1.9 GHz band spectrum to only Nextel.

Pursuant to its Section 316 modification authority, in this EA market the FCC would allocate 7.35 MHz of 1.9 GHz band spectrum to Nextel to replace that company's already-existing 800 MHz band spectrum. The award of such 1.9 GHz band spectrum in this EA therefore clearly would not involve the issuance of an "initial" license by the Commission implicating the competitive bidding provisions of Section 309(j).⁷⁸ Under Sections 316, 301, 303 and 309(j)(6)(E), the Commission maintains in the *Report and Order* that it has the discretion to determine that it better serves the public interest to allow Nextel to purchase 6 MHz of the 1.9 GHz band spectrum free from the filing of competing license applications.⁷⁹ While this position appears meritorious if the FCC were allocating this remaining 1.9 GHz band spectrum to the class of licensees whose spectrum holdings were being modified and moved—General Category and Lower 80 EA licensees, it clearly violates the Commission's statutory mandates under the to maintain regulatory parity and promote competition⁸⁰ and the competitive bidding provisions of Section 309(j)⁸¹ by restricting participation in such allocation to a single entity within such class of licensees.⁸²

3. *Effect of Report and Order Upon Nextel's Total and Clean Spectrum.*

In the Staunton, Virginia-West Virginia EA market, Nextel Partners considerably increases its Total Spectrum from 22.85 MHz to 26.00 MHz, its MHz/Pops Equivalent Spectrum from 16.40 MHz to 26.00 MHz, and its CMRS Cellular Service

⁷⁸ See n. 7 *supra*.

⁷⁹ See n. 8 *supra*.

⁸⁰ See n. 9 *supra*.

⁸¹ See n. 10 *supra*.

⁸² See n. 11 *supra*

Eligible Spectrum from 13.50 MHz to 26.00 MHz.⁸³ These spectrum increases occur because the *Report and Order*'s (a) 800 MHz band movement methodology discussed immediately above and (b) the exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum.

(4) Increase in Value of Nextel's Spectrum Holdings (800 MHz and 1.9 GHz Band Spectrum).

According to the *Report and Order*, the present average fair market value of Nextel Partners' 800 MHz band spectrum to be exchanged as part of the Consensus Parties' movement methodology is \$1.61 MHz/Pop.⁸⁴ The FCC further determined that the present the fair market value of the 800 MHz and 1.9 GHz band spectrum Nextel would receive in exchange therefor would be \$1.70 MHz/Pop.⁸⁵

Applying these figures to the Staunton, Virginia-West Virginia EA market, the present value of the Nextel Control Group's 800 MHz band spectrum to be exchanged under the *Report and Order* would be determined by multiplying Nextel Partners' one hundred thirty (130) Channels, or 6.50 MHz of Clean Spectrum, by the EA market's total population of 334,087 (2003 Pops) and then multiplying the resulting figure of 2,171,566 by \$1.61 MHz/Pop. The resulting figure of \$3,496,221 would be the present value of the 800 MHz band spectrum Nextel Partners would exchange in this EA market under the *Report and Order*. However, since under the *Report and Order*'s movement methodology, the NCG's EA- and Site-Licensed Spectrum moves on a Total Spectrum 1:1 basis, rather than upon a MHz/Pops Equivalent basis, and the FCC allocates all 10 MHz of 1.9 GHz band spectrum exclusively to Nextel by a private sale, the NCG would receive a total of three hundred twenty (320) Clean 800 MHz (120 Channels in the former NPSPAC Channels) and 1.9 GHz band Channels (200 such Channels), or 16.00 MHz of such Spectrum.⁸⁶

Under the Kane Reece Associates, Inc.'s Appraisal, the fair market value of this Spectrum would be determined by multiplying 16 MHz of Clean Spectrum by the EA

⁸³ With the movement of Preferred's and A.R.C., Inc.'s EA-Licensed Spectrum into the one hundred sixty (160) Upper 200 Channels to be vacated by Nextel Partners, its Total and MHz/Pops Equivalent Spectrum set forth immediately above would be reduced by 8.00 MHz. Nextel Partners therefore would hold 14.85 MHz of Total, 8.40 MHz Clean or MHz/Pops Equivalent and 5.50 MHz Cellular Spectrum in this EA market. Since the *Report and Order* allocates the 10 MHz of 1.9 GHz band spectrum exclusively to Nextel, it would increase its Total, Clean or MHz/Pops Equivalent and Cellular Spectrum from zero to 10 MHz. Presumably, in such event, Nextel would be considered to have been issued an "initial" license under any standard.

⁸⁴ See n. 13 *supra*.

⁸⁵ See n. 14 *supra*.

⁸⁶ Although the *Report and Order* is somewhat unclear on this point, it would appear that Nextel Partners would be allocated the one hundred twenty (120) Channels in the former NPSPAC Channels and Nextel would be awarded the 10 MHz in the 1.9 GHz band.

market's total population of 334,087, and then multiplying the resulting figure by \$1.70 MHz/Pop. The resulting figure of \$9,087,166 would be the fair market value of the Clean Spectrum the Nextel Control Group would receive under the *Report and Order*. The \$5,590,945 difference in the fair market values of the spectrum to be exchanged under the *Report and Order* arguably is the amount of the NCG's 800 MHz band spectrum enhancement.

5. *Effect of Report and Order Upon Non-Nextel EA and Cellular-architecture Site Licensees' Spectrum Holdings.*

Preferred holds one hundred fifty (150) General Category EA Channels (7.50 MHz) in this EA market. Due to the presence of site-specific incumbents, Preferred's Channels cover 58.33% of this EA market's total population. Southern therefore holds eighty-seven (87) MHz/Pops Equivalent Channels. A.R.C., Inc. holds ten (10) Lower 80 EA Channels. Due to the presence of site-specific incumbents, A.R.C., Inc.'s Channels cover ____% of this EA market's total population.

Under paragraph 163 of the *Report and Order*, Preferred's and A.R.C., Inc.'s EA- Licensed Spectrum would move to the new Cellular Block on an EA market wide, Clean 1:1 basis. These Channels presumably would move to Nextel Partners' Upper 200 EA Channels beginning with Channel 401. Nextel Partners would retain Channels 561-600 in this EA Market.⁸⁷

Under the *Report and Order*, the value of this 800 MHz band spectrum vacated by Nextel Partners would be determined by multiplying its one hundred sixty (160) channels (8 MHz) by the EA market's total population of 334,087 (2003 Pops) and then multiplying the resulting figure of 2,672,696 by \$1.70 MHz/Pop. The resulting figure of 4,543,583 would be the present value of the 800 MHz band spectrum in the Upper 200 Channels Nextel Partners would vacate to facilitate the movement of the EA- and Site-Licensed Spectrum held by the Non-Nextel Licensees in this EA market.

6. *Effect of Report and Order Upon Other 800 MHz Licensees' Spectrum Holdings.*

Under the *Report and Order*, the Site Channels held by other Non-Nextel Control Group licensees in the General Category Channels (Channels 1-150) and in the Upper 200 Channels would move to the seventy (70) Lower 80 EA Channels, nine (9) Lower 80 Site Channels and thirty-five (35) BILT Channels and to be vacated by the NCG. In this EA market, other Non-Nextel licensees hold twenty-two (22) General Category Site Channels. Other Non-Nextel licensees hold sixteen (16) Site Channels in the Upper 200 Channels.⁸⁸ According to the Report and Order, these Site Channels would receive comparable facilities and their present geographic "footprint." A total of

⁸⁷ See n. 15 *supra*.

⁸⁸ See n. 17 *supra*.

thirty-eight (38) General Category and Upper 200 Site Channels therefore would be moved into seventy (70) Lower 80 EA Channels and forty-four (44) Lower 80 Site and BILT Channels and to be vacated by Nextel on a geographic “footprint” basis. Nextel’s Lower 80 Channels cover an average of 99.73% of the EA market’s population. In this EA market even if the average “footprint” of the General Category and Upper 200 Site Channels is comparable to or greater than Nextel’s Lower 80 Channels to be vacated, sufficient spectrum would be available to accommodate the movement of the Site Channels held by Non-Nextel licensees in this EA market.⁸⁹

7. Effect of Adoption of Preferred’s Improvements.

If the FCC determines to adopt Preferred’s Improvements set forth in the Overview to this First Request For Clarifications, Channels 1-25 of the General Category EA Authorizations held by Preferred would move to Channels 576-600 of the Upper 200 Channels held by Nextel Partners, and available to be vacated, on an EA market wide Clean 1:1 basis. One hundred twenty (120) of Preferred’s remaining one hundred twenty-five (125) General Category EA Channels would move to Channels 601-720 of the former NPSPAC Channels on an EA market wide Clean 1:1 basis. Preferred’s “excess” five (5) General Category EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis.

Under Preferred’s Improvements, A.R.C.’s ten (10) Lower 80 EA Channels would move, at its election, either to the Upper 200 Channels beginning with Channel 570 and moving downward to Channel 561 or the 1.9 GHz band on an EA market wide Clean 1:1 basis. For purposes of this First Request for Clarification, Preferred assumes that A.R.C. would elect to move its Lower 80 EA Channels to the Upper 200 Channels beginning with Channel 570.

Under such approach, Nextel Partners’ seventy (70) Lower 80 EA Channels would move to the 1.9 GHz band on an EA market wide Clean 1:1 basis. Nextel Partners’ General Category, Lower 80 and B/ILT Channels in this EA market would move on a MHz/Pops Equivalent basis to the 1.9 GHz band. Nextel Partners therefore would hold seventy (70) Channels, or 7.00 MHz, rather than the nationwide “running average” of 4.5 MHz of such 1.9 GHz band spectrum on an EA market wide and Clean basis as replacement spectrum for its vacated 800 MHz band spectrum.

Under Preferred’s Improvements, in this EA market the FCC would award the remaining sixty (60) Channels or 3.00 MHz of 1.9 GHz band spectrum by a private sale or other means. However, unlike under the *Report and Order*, Preferred’s Improvements would expand the eligibility to participate in the allocation of such 1.9 GHz band spectrum to the entire class of General Category and Lower 80 EA licensees whose EA- and Site-Licensed Spectrum was moved and modified in this proceeding. Licensees within such class who would forego reimbursement of their own relocation costs, such as Nextel Partners apparently is willing to do, would be entitled to receive an allocation of

⁸⁹ See *id. supra*.

1.9 GHz band spectrum on an EA market wide and Clean basis. Preferred already has indicated in several previous filings that it would be willing to forego reimbursement of its relocation costs in exchange for an allocation of 1.9 GHz band spectrum in the EA markets in which it holds EA Authorizations. Preferred would seek an allocation of the one hundred ten (110) Channels or 5.50 MHz of 1.9 GHz band spectrum in this EA market. Such award of 1.9 GHz band spectrum would not violate the otherwise mandatorily competitive bidding provisions of Section 309(j) since the Commission has the authority under Section 309(j)(6)(E) to avoid mutual exclusivity and would not violate the FCC's statutory mandates to maintain regulatory parity and promote competition.

8. Conclusion.

Under the *Report and Order's* approach, the Nextel Partners experiences a decrease in its Total and Clean or MHz/Pops Equivalent Spectrum in this EA market. With Nextel Partners' vacating one hundred sixty (160) channels in the Upper 200 Channels in the new Cellular Block, it would hold one hundred sixty (160) (8 MHz) as compared to its present four hundred fifty-seven (457) Total Channels (22.85 MHz). Its Clean or MHz/Pops Equivalent Spectrum would decrease from three hundred twenty-eight (328) (16.4 MHz) to one hundred sixty (160) (8 MHz). Nextel apparently is allocated the 10 MHz of 1.9 GHz band spectrum.⁹⁰ According to the *Report and Order*, the value of the 800 MHz and 1.9 GHz band spectrum the Nextel Control Group would receive in this EA market would exceed the value of the 800 MHz band spectrum it would vacate by \$1,036,506 (the value of the spectrum Nextel Partners and/or Nextel would be received would be determined by multiplying 334,087 Pops (2003 figure) by (a) 13.5 MHz of 800 MHz and 1.9 GHz Band spectrum; the resulting figure of 4,510,175 is then multiplied by (b) \$1.70 per MHz/Pop producing a figure of \$7,667,297; the value of the spectrum Nextel Partners would vacate would be determined by multiplying the Pops figure by (a) 4.20 MHz of 800 MHz Band Spectrum (Interleave Channels) and (b) 8 MHz of 800 MHz Band Spectrum (Upper 200 Channels)⁹¹; the resulting figures of (a) 1,403,165 and (b) 2,672,696 are then multiplied respectively by (a) \$1.4875 per MHz/Pop and (b) \$1.70 per MHz/Pop producing a figure of \$6,630,791; the difference between \$7,667,297 and 6,630,791, or \$1,036,506 would be the amount of Nextel Partners' and/or Nextel's spectrum enhancement in this EA market.

⁹⁰ *Contra Report and Order*, at ¶ 325 & n. 743. As noted above, the Wireless Telecommunications Bureau staff has indicated to A.R.C., Inc. that the Commission will allocate 1.9 GHz Band Spectrum on an EA market basis as replacement spectrum for the 800 MHz Band Spectrum to be vacated by either Nextel or Nextel Partners. As a result, Nextel Partners, rather than Nextel would be allocated 10 MHz of 1.9 GHz Band Spectrum in the seventy-one (71) EA markets, in which it, rather than Nextel, holds 800 MHz Band Spectrum.

⁹¹ These figures include the eighty-four (84) Clean or MHz/Pops Equivalent Interleave Channels' Spectrum (Lower 80 and BILT Channels) and one hundred sixty (160) EA market wide Clean Upper 200 Channels to be vacated by Nextel Partners.

Preferred's Clean Spectrum in this EA market increases from eighty-seven (87) Channels (4.35 MHz) to one hundred fifty (150) Channels (7.50 MHz). A.R.C., Inc.'s Clean Spectrum in this EA market from __ Channels (. _ MHz) to ten (10) Channels (0.5 MHz). Since their EA-Licensed moves on a Total, rather MHz/Pops Equivalent Channels basis, these Licensees' Total Channels remain unchanged.

**NEXTEL PARTNERS
AFTER REBANDING**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200 EA	40	100%	2.00	40
6 MHz SMR (NSPAC)	120	100%	6.00	120
10 MHz (1.9 GHz)	200	100%	10.00	200
TOTAL	360	100.0%	18.00	360

ARC/PCSI

CELLULAR ELIGIBLE FREQ'S
160
0
0
160

**NEXTEL PARTNERS BEFORE AND AFTER
PICTURE**

	BEFORE	AFTER
TOTAL CHANNELS	355	360
MHZ/POPS EQUIVALENT	16.40	18.00
EA-WIDE FREQ'S (MHZ)	13.50	18.00

PREFERRED BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	160	160
MHZ/POPS EQUIVALENT	107	160
CELLULAR SPECTRUM (MHZ)	8.00	8.00

**NEXTEL PARTNERS
AFTER REBANDING—
IMPROVEMENTS**

	TOTAL FREQ'S	% OF POPS	MHz/POPS EQUIVALENT	EA-WIDE FREQ'S
UPPER 200 EA	165	100%	8.25	165
6 MHz SMR (NSPAC)	0	100%	0.00	0
10 MHz (1.9 GHz)	140	100%	7.0	140
TOTAL	305	100.0%	15.25	305

ARC/PCSI

CELLULAR ELIGIBLE FREQ'S
35
125
60
220

**NEXTEL PARTNERS BEFORE AND AFTER
PICTURE**

	BEFORE	AFTER
TOTAL CHANNELS	457	305
MHZ/POPS EQUIVALENT	16.40	15.25

EA-WIDE FREQ'S (MHZ)	13.0	15.25
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PREFERRED & A.R.C., INC. BEFORE AND AFTER PICTURE

	BEFORE	AFTER
TOTAL CHANNELS	160	220
MHZ/POPS EQUIVALENT	107	220
CELLULAR SPECTRUM (MHZ)	8.00	11.0

f. Conclusion.

As applied to the spectrum holdings in many of the EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with one or more Non-Nextel EA licensees or Cellular-architecture System licensees, the *Report and Order* clearly fails legally, practically and mathematically both with and without the *pro rata* distribution approach set forth in footnote 444 to paragraph 168.

1. With *Pro Rata* Distribution Approach

The *Report and Order* is unclear whether the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 applies only to EA markets in which (1) Nextel and a Non-Nextel EA licensee already operate Cellular-architecture Systems in the ESMR portion of the band or (2) Nextel otherwise holds insufficient Upper 200 EA Channels to accommodate the movement of the Non-Nextel EA or Cellular-architecture System licensee's EA- and Site-Licensed Spectrum or is generally applicable.⁹² As noted above, the *pro rata* distribution approach serves to reduce the Total EA and Site Channels of Non-Nextel Licensees in markets in which Nextel or Nextel Partners shares EA-Licensed and/or Site-Licensed Spectrum with one or more Non-Nextel Licensees while generally maintaining the NCG's Total Spectrum and considerably increasing its Clean or MHz/Pops Equivalent Spectrum.⁹³

⁹² See *Report and Order*, at ¶ 168 & n. 444.

⁹³ Since the *Report and Order* allocates the Nextel Control Group the 6 MHz in the new Cellular Block comprising the former NPSPAC Channels and the 10 MHz in the 1.9 GHz band, the NCG would experience a considerable loss of Total Channels only in EA markets in which Non-Nextel EA and Cellular-architecture System Site licensee(s) hold more than 200 Channels. As noted above, even in these EA markets, Nextel considerably would increase its Clean or MHz/Pops Equivalent Spectrum. However, the Commission seemingly indicates in ¶ 164 that the *pro rata* distribution approach is applicable in EA market in which two or more ESMR licensees already operate and each holds more Channels than can be accommodated by the movement to the one hundred twenty (120) Channels comprised of the former NPSPAC Channels (821-824 MHz/866-869 MHz).

By improperly moving Site-Licensed Spectrum on a Total Channels, rather than upon a Clean Spectrum or MHz/Pops Equivalent basis,⁹⁴ the *Report and Order* creates an artificial spectrum “logjam” in many of the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners share EA- (and occasionally Site-Licensed) Spectrum. The *Report and Order* then seeks to resolve its mathematical quandary by limiting the number of Total Channels a Non-Nextel EA licensee or Cellular-architecture System licensee may hold in a particular EA market even though Nextel holds a nationwide “running” average of 3.3 MHz of 700 MHz Guard Band spectrum and is allocated a nationwide 10 MHz license in the 1.9 GHz band.⁹⁵

The Consensus Parties’ Proposal sought to discriminate between the Nextel Control Group and Non-Nextel EA licensees by conditioning the movement of the latter’s EA authorizations upon satisfaction of the two prongs of the Cellular Deployment Test. Upon meeting one of such prongs, a Non-Nextel EA licensee’s EA Authorizations would move into the new Cellular Block only upon a geographic “footprint” basis. As pointed out in Preferred’s Ex Parte Presentations filed on March 2, 2004 and April 23, 2004, such disparate treatment violated the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the FCC’s statutory mandate to maintain regulatory parity and promote competition.⁹⁶

The *Report and Order* abandoned the Cellular Deployment Test with respect to Non-Nextel EA licensee’s EA Authorizations. However, it effectively replaced the geographic “footprint” limitation in the Consensus Parties’ Proposal with a reduction of the Non-Nextel EA and Cellular-architecture System Site licensee’s Total Channels thus negatively impacting both spectrum rights purchased by a Non-Nextel EA licensee in FCC Auctions #34, #36 and #43.⁹⁷

The *Report and Order* seeks to justify its application of the *pro rata* distribution approach by the reduction of the Nextel Control Group’s Total EA Channels.⁹⁸ However, the Commission impermissibly discriminates against Non-Nextel EA, Cellular-architecture System Site and other Site licensees with respect to several other issues including, but not limited to:

- (10) The FCC previously has granted Nextel and Nextel Partners a waiver so that their respective Site Channels construction deadline coincides with such deadline for their respective EA Authorizations—

⁹⁴ See *Verizon Wireless White Paper*, at pp. 11-12 & n. 49.

⁹⁵ See *id.*

⁹⁶ See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-6; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at pp. 37-38; n. 14 *supra*.

⁹⁷ See 47 C.F.R. § 90.683.

⁹⁸ See *Report and Order*, at ¶ 168 & n. 444.

December 20, 2005;⁹⁹ however, with respect to Site Channels held by Non-Nextel EA licensees, the *Report and Order* such Channels to the ESMR portion of the band only if the Non-Nextel EA licensees have constructed such Channels as part of a Cellular-architecture System by the date of the publication of the *Report and Order* in the Federal Register. No rationale is offered by the Commission to justify such discriminatory treatment that would appear similar to that barred by the D.C. Circuit Court of Appeals in the *Fresno Mobile Radio* case.¹⁰⁰

(11) In paragraph 163 of the *Report and Order*, the Commission further restricts the movement of Site-Licensed Spectrum held by Non-Nextel EA licensees to such Spectrum held in EA markets in which such licensees hold one or more EA Authorizations. No rationale is offered by the FCC for this restriction, which in certain cases may require a Non-Nextel EA licensee to deconstruct a Cellular-architecture System in markets in which it holds only Site licenses.

(12) The FCC exclusively allocates the 10 MHz of 1.9 GHz band to Nextel regardless of its 800 MHz band spectrum holdings purportedly by a private sale rather than by modifying and reassigning the frequencies of General Category and Lower 80 EA Authorizations in each of the one hundred seventy-five (175) EA markets on an EA market wide Clean 1:1

(13) basis.¹⁰¹

2. Without *Pro Rata* Distribution Approach

The *pro rata* distribution approach apparently results from Nextel's objection to the costs of vacating its Upper 200 EA Channels on a Clean 1:1 basis to accommodate the EA- and Site-Licensed spectrum holdings of Non-Nextel EA and Cellular-architecture System Site licensees.¹⁰² According to Nextel, vacating a considerable portion of its Upper 200 EA Channels in Southern's core markets would require it to construct numerous additional cell sites and expending several hundred million dollars in capital expenditures.¹⁰³ However, contrary to Nextel's contention in its June 14, 2004 Ex Parte Presentation, it would vacate the vast majority of its Upper 200 EA Channels in only six (6) EA markets.¹⁰⁴

⁹⁹ See Nextel Partners, Inc., Form 10-K for the period ended December 31, 2003, at pp. 20-21.

¹⁰⁰ See *Report and Order*, at ¶ 163; *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

¹⁰¹ See *Report and Order*, at ¶¶ 31-35.

¹⁰² See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, p. 4.

¹⁰³ See *id.*

¹⁰⁴ Southern holds 257 or more Total Channels in the following EA markets: (1) Atlanta, Georgia-Alabama-North Carolina (260 Total Channels); (2) Huntsville, Alabama-Tennessee (259 Total Channels); (3) Birmingham, Alabama (347 Total Channels); (4)

Ignoring the impermissible discrimination set forth above with respect to the treatment of Non-Nextel EA and Cellular-architecture System Site licensees' spectrum holdings, the movement methodology set forth in paragraph 163 of the *Report and Order* provides a guide to resolving its legal, practical and mathematical infirmities encountered upon applying it to the license holdings in EA markets. As the Commission determined, EA authorizations should move into the ESMR portion of the band upon an EA market wide, Clean 1:1 basis. Such movement should be based upon the type of license held rather than the identity of the licensee.

As Preferred previously has noted, Site-Licensed Spectrum should be moved on a Clean or MHz/Pops Equivalent basis. Moving such Spectrum on a Total Channels or EA market wide Clean 1:1 basis results in an unnecessary spectrum "logjam" in many of the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA licensees. Moreover, such approach clearly conflicts with the competitive bidding provisions of Section 309(j) and numerous FCC precedent.¹⁰⁵ Furthermore, such approach necessarily leads the Commission to impermissibly discriminate against Non-Nextel EA licensees, Cellular-architecture System Site and other Site licensees.

However, Preferred maintains that if the Site-Licensed Spectrum of the Nextel Control Group moves to the ESMR portion of the band on an EA market wide, Clean 1:1 basis without regard to its construction status or market location, the Site-Licensed Spectrum of Non-Nextel EA licensees is required to be identically treated.¹⁰⁶ Such treatment would allow Non-Nextel EA licensees to move Site-Licensed Spectrum it presently holds or acquires into the ESMR portion of the band if it constructs such Spectrum as part of a cellular-architecture system by the construction deadline for Nextel's or Nextel's Partners' Site-Licensed Spectrum regardless of whether it holds an EA Authorization in the particular market.

Montgomery, Alabama (257 Total Channels); (5) Mobile, Alabama (313 Total Channels); and (6) Biloxi-Gulfport-Pascagoula, Mississippi. Assuming Southern's General Category EA-and Site- Licensed Spectrum (and in certain EA markets several of its BILT Channels) moves into the former NPSPAC Channels in these EA markets, Southern would need 137-140 of Nextel's or Nextel Partners' Upper 200 EA Channels in four of these EA markets. Nextel or Nextel Partners would retain 60-63 Upper 200 EA Channels, its 900 MHz spectrum (nationwide "running" average of 3.3 MHz) and would be allocated exclusively 10 MHz of 1.9 GHz band spectrum or a total of 16-16.15 MHz of Clean or MHz/Pops Equivalent Spectrum. Even without the 900 MHz spectrum, Nextel's Clean or MHz/Pops Equivalent Spectrum actually would increase in these four EA markets.

¹⁰⁵ See *Verizon Wireless White Paper*, at pp. 4-16; Cellular Telecommunications & Internet Association, Ex Parte Presentation, December 4, 2003, at pp. 3-4, 8-13.

¹⁰⁶ Failure to treat such Site-Licensed Spectrum identically to that held by the Nextel Control Group would violate the Commission's statutory mandate to maintain regulatory parity and promote competition.